Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997 _____

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ — **PETITIONERS**

VERSUS

DENNIS R. SWITZER, DENNIS R. SWITZER, CPA, LTD. — **RESPONDENT**

On Petition For Writ Of Certiorari
To The Mississippi Supreme Court

PETITION FOR WRIT OF CERTIORARI

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23 pp

Before presentation of the **Questions Presented for Review**, Plaintiffs beg to elucidate by means of the following solemn assertions:

Trial of the Defendant on a complaint (June, 1985) of accounting malpractice and damage has been aborted twice, first via an erroneous directed verdict (November, 1987) and then by cessation of proceedings just before trial was to begin (May 13, 1993).

The disputed grounds which will be offered this Court by the defendant, trial court and Mississippi Supreme Court are that minutes before trial was to begin, Plaintiffs Lynn Wirtz and Charlena Wirtz ***willingly*** agreed to immediately end all their legal claims in exchange for a verbal promise of $ 18,000 (an amount arbitrarily stipulated by the trial judge). In the Opinion of the Mississippi Supreme Court it is repeated ***erroneously as fact*** that the Plaintiffs have admitted to the existence of a legally valid settlement agreement. Contrarily, the Plaintiffs have always disputed the existence of such an agreement, and it is the Mississippi court's refusal to recognize this which has resulted in the denial of the Plaintiffs' constitutional right to due process).

Additionally, the defendant, trial court and Mississippi Supreme Court have taken the position that all five Plaintiffs lost their rights of free speech concerning the Defendant's CPA licensing boards because Lynn and Charlena Wirtz "did not specifically except such a right from the (alleged, oral) settlement agreement" (affirmed Opinion and Order on Motion of Defendant's to Enforce Settlement Agreement; December 7, 1993, p. 5).

Thus, Plaintiffs respectfully submit unto this Court that the central question is whether the undisputed circumstances and specific conditions with which Lynn and Charlena Wirtz were suddenly and unexpectedly confronted on the morning of May 13, 1993, and the subsequent rulings of the Mississippi courts are in violation of their rights of due process and result in the unconstitutional infringement of their rights of free speech.

1. Do litigants have a constitutional right to participate in conferences amongst attorneys and the courts wherein oral compromise and settlement agreements are discussed and finalized and later upheld as binding upon the litigants?

2. Specifically, have the Mississippi courts taken action which displays a pattern of violation of the Plaintiffs' right to due process by denying the Plaintiffs the right to participate in conferences before the court where their case allegedly was settled and thereafter repeatedly denying the Plaintiffs the opportunity to be heard on the disputed issue of the existence and terms of the alleged settlement agreement; striking Plaintiffs' evidence from the record; falsifying the record and taking all action necessary to prevent the Plaintiffs from trying the defendant?

3. Specifically, has the Mississippi Supreme Court taken action which unconstitutionally infringes upon the Petitioners' First Amendment right of free speech by ordering that the Petitioners may not institute or pursue any claims before the Mississippi and Louisiana State Boards of Public Accountancy by imposing this term into an alleged, disputed oral compromise and settlement agreement when this term was never a justiciable issue before the trial or state courts and admittedly never mentioned in a "settlement conference" wherein the Petitioners were not allowed to participate and wherein the alleged final compromise and settlement agreement was reached?

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CITATIONS OF OPINIONS AND ORDERS

1. **OPINION AND ORDER** No. 94-CA-00040-SCT, Mississippi Supreme Court; November 6, 1997; Not designated for publication, pursuant to M.R.A.P. 35-A (See Appendix "C").

2. **ORDER** No. 94-CA-00040, Mississippi Supreme Court; April 26, 1996; Unpublished interlocutory Order (See Appendix "D").

3. **ORDER** No. 94-CA-00040, Mississippi Supreme Court; April 1, 1996; Unpublished interlocutory Order (See Appendix "E").

4. **ORDER** No. 94-CA-00040, Mississippi Supreme Court; December 13, 1995; Unpublished interlocutory Order (See Appendix "F").

5. **ORDER** No. 94-CA-00040, Mississippi Supreme Court; August 16, 1995; Unpublished interlocutory Order (See Appendix "G").

6. **ORDER** Nos. 94-CA-00040, 94-TS-00728, and 94-TS-00857; June 22, 1995; Unpublished interlocutory Order (See Appendix "H").

7. **Order on Objections to Statement of the Evidence**; Civil Action No. 5701, Circuit Court, 6th Judicial District, Adams Co., Mississippi, July 21, 1994; Unpublished trial court Order appealed to Mississippi Supreme Court and denied (See Appendices "G-K", supra).

8. **Order on Motion of Defendants/Appellees for Sanctions**; Civil Action No. 5701, Circuit Court, 6th Judicial District, Adams Co., Mississippi, June 20, 1994; Unpublished trial court Order appealed to Mississippi Supreme Court and denied (See Appendices "G-K", supra).

9. **Opinion and Order on Motion of Defendants to Enforce Settlement Agreement**; Civil Action No. 5701, Circuit Court, 6th Judicial District, Adams Co., Mississippi, December 7, 1993; Unpublished trial court Order appealed to Mississippi Supreme Court and affirmed (See Appendix "R").

10. *Wirtz v. Switzer*, 586 So.2d 775 (Miss.1991).

11. **Final Judgment;** Civil Action No. 5701, Circuit Court, 6th Judicial District, Adams Co., Mississippi, November 13, 1987; Unpublished trial court Order appealed to Mississippi Supreme Court which reversed and remanded in *Wirtz v. Switzer*.

JURISDICTION

The Mississippi Supreme Court decided this case on November 6, 1997 (See Appendix "C"). The Plaintiffs/Petitioners timely filed a Petition for Rehearing which was denied December 22, 1997 (Appendix "A,B"). 28 U.S.C. S. 1257(a) confers on this Court jurisdiction to review on a writ of certiorari the judgment of the Mississippi Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances, ***First Amendment to the Constitution of the United States.***

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law, ***Seventh Amendment to the Constitution of the United States.***

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws, ***Fourteenth Amendment to the Constitution of the United States, Section I, Article XIV.***

STATEMENT OF THE CASE

Plaintiff Charlena Wirtz, executrix of an estate, hired the defendant and local accounting firm owner Dennis R. Switzer to handle all accounting and tax advisory work for the estate. In January of 1984 he produced a report of estate assets and liabilities. This was relied upon by the executrix, her attorney and the attorney for certain heirs as the basis for a ratified final estate settlement agreement (January 3, 1984).

It was later discovered that Switzer's report showed $ 33,406 more than should have been shown as available for the heirs. Before Switzer actually calculated that figure, he estimated it at about $ 30,000 and directed Mrs. Wirtz through her attorney to withhold it from the heirs. According to the estate settlement agreement, Mrs. Wirtz was required to pay all taxes prior to the distribution of the estate assets. Pursuant to Switzer's advice, Mrs. Wirtz withheld $ 30,956 and delivered checks totaling $ 70,000.00 to the heirs' attorney along with a letter of explanation concerning the accounting error.

The attorney for the heirs disrupted the estate settlement and sued Mrs. Wirtz (February 21, 1984). The Adams County Chancery Court ordered Mrs. Wirtz to pay the $ 30,956. To settle this lawsuit, Mrs. Wirtz paid costs of litigation (February-June, 1984) plus a negotiated $ 15,000 which came from her family's personal funds, since pursuant to the estate settlement agreement, the attorney for the heirs now controlled all relevant estate funds, future income, and property.

On March 2, 1984 Mrs. Wirtz met with Switzer to discuss his accounting errors and the pending lawsuit against her. However, with his attorney present, Switzer refused to discuss the matter and disavowed all responsibility for his accounting errors and refused to assist her in any manner. When Mrs. Wirtz stated at this meeting that "this isn't fair", Switzer's attorney responded rhetorically, "show me where it's written that life has to be fair". Switzer severed all communication with his client, Mrs. Wirtz, and he did not respond to an offer she made on December 12, 1984 to settle everything in return for reimbursement of the $ 15,000 only.

On June 18, 1985 after making another attempt to avoid litigation against Switzer for her claims against him, the Wirtzes who were residuary legatees of the estate, sued Switzer (Adams County Circuit Court No. 5701).

At the first trial (November 4-5, 1987) Switzer was granted a directed verdict. The Mississippi Supreme Court of that time found sufficient judicial error to reverse and remand for new trial, but denied the Plaintiffs any opportunity to seek punitive damages or any award for their

mental anguish, *Wirtz v. Switzer*, 586 So.2d 775 (Miss.1991); September 4, 1991.

The second trial was aborted on May 13, 1993 minutes before it was to begin, and it is the circumstances and specific events which occurred during some forty-five minutes that morning, and the record of events afterwards which are now important.

Nothing was recorded that morning and no docket entry was made concerning what had occurred.

In summary, the record shows that:

For several months following May 13, 1993, Switzer's attorney litigated against the Plaintiffs on the basis of a disputed oral settlement agreement in attempts to force them to sign onto terms and conditions to which the record shows (see Appendix) they immediately and ever since have objected. Specifically, the Plaintiffs disputed that a settlement agreement was reached, but rather asserted that on May 13, 1993, the trial court had arbitrarily stipulated that they would either accept $ 18,000 or receive a directed verdict against them. Switzer alleges that an oral settlement agreement was reached that morning amongst attorneys during a settlement conference which was occurring without the Plaintiffs' being present. After the Plaintiffs' attorneys informed them that the trial court had stipulated that they would receive only $18,000 and Plaintiffs objected, the trial judge specifically denied them the opportunity to speak with him concerning the events which had transpired during the settlement conference wherein the alleged oral settlement agreement had been struck minutes before.

Although it is undisputed that no terms were discussed, even amongst attorneys and the trial judge, other than $ 18,000 in exchange for an immediate cessation of litigation, Switzer's attorney then persisted in obtaining the trial court's assistance in imposing additional terms on the Plaintiffs. Paramount of these additional terms at issue in Plaintiffs' Petition for Writ of Certiorari is the specific term enforced by the trial court and later affirmed by the Mississippi Supreme Court which precludes the Plaintiffs from communicating with the Mississippi and Louisiana State Boards of Public Accountancy about Switzer's accounting performance and professional conduct. It is undisputed that this term was never mentioned on May 13, 1993.

The Plaintiffs continually disputed the existence of any proper settlement agreement prior to Switzer's filing a motion to enforce it. However, during this dispute they offered to settle the matter for the court-stipulated $ 18,000 on the condition that Switzer's attorney cease attempts to impose the aforementioned and other unreasonable terms, never

discussed or mentioned on May 13, 1993. Switzer's attorney refused and continued to litigate in order to force the Plaintiffs to various additional terms. As on May 13, 1993, at the "hearing" on the Defendant's Motion to Enforce Settlement Agreement (August 30, 1993), the trial judge refused the Plaintiffs' requests to be heard. The trial court rendered its Opinion and Order on Defendant's Motion to Enforce Settlement Agreement on December 7, 1993. This Order was written by Switzer's attorney and signed ***verbatim*** by the trial judge, and it specifically imposed the added term that precluded the Plaintiffs from "instituting, prosecuting, or pursuing any complaint or other proceeding of any kind against the Defendants or any successor firm with the Mississippi State Board of Public Accountancy or the Louisiana State Board of Public Accountancy" (Appendix "R"; p.102). The Plaintiffs appealed to the Mississippi Supreme Court. During the following months, Switzer's attorney obtained orders from the trial court which struck numerous documents from the record which the Plaintiffs had previously designated for their appeal pursuant to M.R.A.P. 10. Several of these documents described the conditions to which Plaintiffs Lynn and Charlena Wirtz were subjected on May 13, 1993 and which they claimed to be in ***violation of their civil liberties***.

The Plaintiffs appealed these trial court orders (which struck their designated documents) to the Mississippi Supreme Court during the pendency of their principal appeal but the Mississippi Supreme Court summarily upheld these orders (see Appendices "I-K"; June 22, 1995).

On November 6, 1997 the Mississippi Supreme Court issued an Opinion wherein it found the Plaintiffs' case and arguments to be "without merit" and found all activities of the trial court to be without a "hint of impropriety".

In addition to the Mississippi Supreme Court Orders, supra, which disallowed from the record the documents designated by the Plaintiffs for their appeal, the Mississippi Supreme Court denied the Plaintiffs' Petition for Rehearing (December 22, 1997), their requests for oral argument, four requests for en banc review; and declared that its Opinion "is not designated for publication and may not be cited". (Additionally, the Mississippi Supreme Court denied the Plaintiffs' request to file an extended brief, and all motions to reconsider filed relative to the above Orders).

Pursuant to United States Supreme Court Rule 14(1)(i), the Plaintiffs hereby reference the documents contained in the Appendix wherein the federal questions sought to be reviewed were raised with a brief description of the way in which they were passed on by the Mississippi courts:

APPENDIX "Q"

1. Plaintiffs recorded that: *"We were given an ultimatum on May 13, 1993 that we would either accept $ 18,000 or that our case would be dismissed via a directed verdict in favor of Switzer"* (Appendix "Q"; p.96).

This document was filed as an attachment to the Plaintiffs' Response to Defendant's Motion to Enforce Settlement Agreement and entered into evidence at the hearing of August 30, 1993 prior to the trial court's Opinion and Order on Defendant's Motion to Enforce Settlement Agreement (December 7, 1993) which the Plaintiffs appealed to the Mississippi Supreme Court. The Plaintiffs referred the Mississippi Supreme Court to this document (CP 491) repeatedly in their principal appellate brief, reply brief, and petition for rehearing, and its truth was never rebutted. Rather, the trial court entered the statement that it was "***unaware*** of any coercion" in the Order on Defendant's Objections to Statement of the Evidence (July 21, 1994; CP 620, pp. 4-5). The Mississippi Supreme Court does not acknowledge this document. Instead, in its Opinion, it finds that the Plaintiffs' former attorney told the truth at the April 18, 1994 hearing on the Defendant's Objections to the Statement of the Evidence when he testified (at the trial judge's request) that he was unaware of any duress imposed upon the Plaintiffs on May 13, 1993. The Mississippi Supreme Court decides this, ***despite the fact that that same attorney had previously entered this document as an attachment to the Plaintiff's response, prior to the hearing of August 30, 1993 on the defendant's motion***. This document reflects throughout, the denial of the Plaintiffs due process rights by the trial court.

APPENDIX "P"

2. Following the hearing on the Defendant's Motion to Enforce Settlement Agreement (August 30, 1993), at which the trial judge refused the Plaintiffs' requests to testify and explain the grounds upon which they disputed the existence and terms of the alleged oral settlement agreement, they wrote a letter directly to the judge (September 20, 1993). In this letter the Plaintiffs state:

. . . Plaintiffs made very sure with their attorneys that neither Mr. Gamblin nor the court was asking them to give up any other rights or make any other concessions.

Plaintiffs mentioned specifically their rights to ask the Mississippi and Louisiana State Boards of Public Accountancy to investigate the defendant's accounting performance and professional conduct.

They were assured that these were not at risk, as they had not been mentioned by Mr. Gamblin.

Nor did Plaintiffs' attorneys suggest in the slightest, that Plaintiffs had any duty to offer up those rights as negotiable items, or to voluntarily forfeit them (Appendix "P"; p.92).

The Plaintiffs had no other alternative than to write the trial court judge directly because he consistently refused them an opportunity to be heard at court. Specific references are made to the unlawful attempts to infringe upon the Plaintiffs' ***right to freely communicate with Switzer's licensing boards*** throughout all of the Plaintiffs' responses to the various motions filed by Switzer's attorney. However, it was obvious that the trial judge was not considering any of the Plaintiffs' documents responding to the various motions of Switzer's attorney. In fact, the trial court signed ***verbatim***, three "opinion and orders" separately submitted by Switzer's attorney, including the Opinion and Order on the Motion of Defendant to Enforce Settlement Agreement. The trial court judge entirely ignored the recorded responses of the Plaintiffs disputing the alleged oral settlement agreement and signed all "orders" Switzer's attorney presented to him. The Mississippi Supreme Court does not acknowledge this document in its Opinion.

APPENDIX "O"

3. In this document, Appellants' Response to Defendant's Motion for Sanctions, Plaintiffs forcefully raised both the issues of duress/denial of due process and infringement of their first amendment rights of free speech concerning Switzer's licensing boards as follows:

DENIAL OF THE PLAINTIFFS' RIGHT OF FREE SPEECH TO FILE COMPLAINTS WITH THE STATE BOARDS OF PUBLIC ACCOUNTANCY

These unacceptable conditions are: (A) Effective waiver of Plaintiffs' right to submit complaints and present evidence of the defendant's accounting failures and unprofessional conduct not meeting the standards of the state boards of public accountancy in Mississippi or in Louisiana (Appendix "O"; p.76).

Long prior to May 13, 1993, defense counsel knew that the Plaintiffs had stated that they considered it a duty to file complaints with the state boards of public accountancy in Mississippi and Louisiana, (Ex. "A"). He chose, however, not to mention on May 13, 1993 any waiver of such rights.

In their Response to Defendant's Motion to Enforce Settlement Agreement, August 27, 1993, Plaintiffs explained that the wording of defense counsel's draft would obviously preclude the exercise of those rights. Defense counsel deemed their claim to be "without merit and frivolous", ("Opinion and Order", p.5); declared that Plaintiffs deserved sanctions for "recalcitrance", and then ironically included the specific conditions of waiver of rights in his "Opinion and Order", (pp.5-6) (Appendix "O"; p.79).

Defense counsel chose not to mention the waiver of such rights at the discussion among attorneys and judge on May 13, 1993. Plaintiffs' position is that as the "buyer" of such a waiver, the defendant/defense counsel had the responsibility to inform the court and the Plaintiffs' attorneys that he wanted this term to be part of the settlement. Plaintiffs, and their attorneys on May 13, 1993 and presently, believe that no obligation exists for them to sacrifice these rights, particularly since they did not instigate or encourage the discussions of May 13, 1993, and had no intention to waive those rights (Appendix "O"; p.85).

DENIAL OF DUE PROCESS

An admitted verbal submission of Plaintiffs Mr. and Mrs. Lynn Wirtz, under duress, on May 13, 1993 when their attorneys informed them that the court was giving them an ultimatum that they would either accept partial restitution, of $ 18,000.00, or see the defendant

granted a directed verdict, and "get nothing". They were also told that "the Supreme Court will affirm and you'll just be out a lot more money" (Appendix "O"; p.76).

The Plaintiffs object to the circumstances of duress which left them with no reasonable alternative other than to accept the court's ultimatum. These circumstances are attributable to the improper actions of this court, and Plaintiffs have preserved and maintained their right to appeal the trial court's actions to the Supreme Court of Mississippi, according to the Mississippi Rules of Civil Procedure and the Mississippi Supreme Court Rules, in good faith and in accordance with all ethical and legal principles (Appendix "O"; p.77).

Plaintiffs Lynn and Charlena Wirtz were isolated from all settlement discussions, and subjected to duress. Their attorneys, without even the authority from their clients to enter into a settlement agreement which the defense counsel argues was reached, served as only messengers, periodically and perhaps only partially informing the Plaintiffs as to what the trial court judge and the defense counsel were agreeing would be the final compromise and settlement agreement (Appendix "O"; p.78).

The Plaintiffs were not allowed to participate, even to the extent that they could make an offer of compromise and settlement. Rather, they were told that they were to accept immediately the $18,000.00 in return for dropping the lawsuit against the defendant, or receive a directed verdict in favor of the defendant, and therefore receive nothing. In the meantime, a jury waited, and the Plaintiffs were told by their attorneys that it was their firm belief that the Mississippi Supreme Court would not reverse the decision. Thus, the Plaintiffs were given two choices by the trial court; accept $18,000.00; or nothing, and in fact face future expense and inordinate amounts of time in attempting to combat a continuously fraudulent and unscrupulous defense.

Plaintiffs had prepared for trial and were totally shocked at the turn of events. They knew something was very wrong and demanded an explanation from their attorneys. They were told that the trial court judge had ruled that neither the testimony of their expert witness (CPA) from the prior trial nor the testimony of their recently hired expert witness (CPA) would be satisfactory. Plaintiffs herewith state that they

will challenge this action in their forthcoming appeal. (Appendix "O"; p.78).

This document was filed into the trial court on February 11, 1994 and became a referenced part of the record on appeal to the Mississippi Supreme Court (CP 530). It was entirely ignored by the trial court and was not acknowledged by the Mississippi Supreme Court on appeal.

APPENDIX "N "

4. In Petitioners' Statement of the Evidence:

> Then, the trial court judge arbitrarily declared that the Plaintiffs would either accept $18,000.00 and drop the lawsuit against the defendant, or the defendant would receive a directed verdict in his favor. This figure of $18,000.00 was arbitrarily decided upon by the trial court judge to be the value of the Plaintiffs' lawsuit, despite the fact that the Plaintiffs had the previous day worked around the clock to provide documentation of their damages at the trial court judge's own request; and this documentation which was by no means an entire account of all of the Plaintiffs' damages since it was produced on such short notice, proved damages in excess of $60,000.00 directly attributable to the defendant's accounting negligence.
>
> If this situation does not amount to duress, and does not vitiate any consent to a settlement agreement, then Plaintiffs indeed must misapprehend the meanings of those words. Even the verbal settlement agreement which was reluctantly capitulated to by the Plaintiffs under these circumstances did not include any discussion of the waiver of their rights to complain to the State Boards of Public Accountancy, or any other regulatory or professional organization, as has been discussed in other documents which the Plaintiffs have recently filed (Appendix "N"; p.74).

This document was entered at the trial court on March 7, 1994 and was stricken from the record by the trial court judge when he signed Switzer's submitted Order on Defendant's Objections to Statement of the Evidence, verbatim, June 20, 1994. Petitioners entered it as Exhibit "C" to their Brief in Support of Plaintiffs' Motion to Consolidate Appeals and Compel Transmission of Record, November 3, 1994. The Mississippi Supreme Court does not acknowledge it in its Opinion.

APPENDICES "A, L, & M"

In the interest of brevity, Petitioners will not quote further from the Appendices, with one last exception. Suffice it to say that Petitioners exhausted every legitimate legal means before the Mississippi Courts to preserve the rights herein discussed. These issues were thoroughly briefed to the Mississippi Supreme Court (See Issues #1,2,3,6,7, particularly 8, and 11; pp. 25-31; 35-38; 38-41; 48-49 where ***denial of due process*** is covered and: Issues # 5 and 9; pp. 33-35; 42-43 where ***infringement of right of free speech*** is covered). Nonetheless, without exception, the Mississippi Courts entirely dismissed Petitioners' proof and arguments without discussion or good faith legal analysis. Petitioners submit to this Court that references to the rights herein sought to be recognized are so numerous and interwoven into all of the documents included in the Appendix and many more which are not reproduced, that further proof of preservation of their review is unnecessary. Finally, Petitioner quotes from the Petition for Rehearing (Appendix "B"; p.12).

> If the activities which undeniably occurred in the trial court under Judge Richard T. Watson are to be reinforced by this Court as being fully acceptable, this fact must be generally known. However, this Court has invoked M.R.A.P. 35-A stating that this "Opinion" is not designated for publication and cannot be cited. Without question, this case satisfies the mandatory criteria for designation for publication. Firstly, this Court is establishing a new rule which has never been recognized in any court of law; namely, that parties can be prohibited by a judge from participating in settlement negotiations wherein agreements between attorneys are reached binding the parties. Secondly, this Court acknowledges that it is in the public interest for State licensing boards to review cases of professional malpractice. Thirdly, this Court is establishing a rule that the judicial system has jurisdiction to determine a person's right to bring complaints before a professional board; when it is undisputed that this claim was never submitted to the court for judicial resolution. **This kind of denial of First Amendment rights of free speech is absolutely unprecedented.**

ARGUMENT

There is no question that this is an ugly case. Petitioners have shown that throughout the record are found instances where the trial court judge threatened them without any legal justification whatsoever with:
(A) Substantial monetary sanctions if they would not sign Switzer's attorney's "Release",
(B) Vague undefined additional sanctions for the same reason,
(C) Dismissal of their case "if trial was not held for any reason attributable (sic) to Plaintiffs on May 13, 1993,
(D) Directed verdict in favor of Switzer if the Petitioners would not immediately cease litigation in exchange for the court-stipulated $ 18,000.

The trial judge accused the Petitioners of (undefined) behavior "tantamount to obstruction of justice" and effusively demonstrated his camaraderie with Switzer's attorney in open court, announcing his friendship with an executive officer of Switzer's attorney's law firm and encouraging him to take the deposition of his avowed friend Federal Judge David Bramlette, who disrupted the estate by suing Mrs. Wirtz years before. The trial court judge did everything in his power to prevent Petitioners from trying Switzer for accounting malpractice, for whatever reasons. The Mississippi Supreme Court affirmed the trial court's Orders in their entirety. In the Mississippi Supreme Court's Opinion it repeatedly misstates facts which are undisputed in the record (see Appendix "B"; Plaintiffs' Petition for Rehearing, IV SPECIFIC INACCURACIES) and throughout "finds facts" favorable to Switzer without once referencing Petitioners' documents. This is particularly evident where the Mississippi Supreme Court dismisses the Petitioners' argument that a settlement agreement was not finalized on May 13, 1993 by simply stating "Wirtz admitted that a settlement agreement was reached in the amount of $ 18,000 but denied the relinquishment of any rights to seek disciplinary action against Switzer from the Mississippi and Louisiana State Boards of Public Accountancy" (Appendix "C"; Opinion, p.8). A cursory review of Petitioners' Appendices show that ***Petitioners have always denied ever willingly entering into anything resembling a legally proper settlement agreement.***.

However, Petitioners do not seek this Court's review of these specific instances of bias attributable to the Mississippi courts. Rather, the manifestation of this bias on May 13, 1993 and subsequent efforts to enforce the trial court's Opinion and Order on Defendant's Motion to Enforce Settlement Agreement, which the Mississippi Supreme Court affirmed, is the focus of the present Petition for Writ of Certiorari.

There is no dispute in this case that Petitioners Lynn and Charlena Wirtz were unaware that a settlement conference was taking place the morning of May 13, 1993. There is no dispute that when they learned of its

occurrence, they requested permission to see the judge and were denied (Appendix "C"; Opinion). There is no dispute that the trial court judge stipulated that the Petitioners were to receive the amount of $ 18,000.00 in exchange for immediatley dropping all litigation against Switzer and that no other terms were discussed during the settlement conference. There is no dispute that no terms were put in writing and no record or docket entry exists reflecting the alleged settlement agreement.

The first question which Petitioners pose to this Court is whether they had a constitutional right to participate in the settlement conference wherein the alleged oral settlement agreement was struck. The dangerous implications of this Court's denial of this fundamental right will never be more clearly illustrated than in the present case. A fraction of the worth of Petitioner's claim against Switzer was stipulated by the trial judge and enforced through his verbal threat of an adverse directed verdict as communicated by Petitioners' attorneys and later by the "Orders" submitted by Switzer's attorney, which he signed, verbatim. Worse, even after the fact, Switzer's attorney sought and obtained conditions admittedly never mentioned during the settlement conference; namely, for example, the forfeiture of Petitioners' right to institute or initiate complaints with Switzer's licensing boards concerning his accounting malpractice and professional misconduct. If this is acceptable in state jurisdictions which have no statutory evidentiary requirements for alleged oral compromise and settlement agreements, as in Mississippi, there is literally no right to a jury trial and no guarantee of any input into settlement negotiations for litigants.

In fact, Petitioners cited ample authority that they were entitled to an evidentiary hearing on the issue of the existence of the alleged oral settlement agreement, *Callie v. Near*, 829 F.2d 888 (9th Cir.1984); *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 621 (6th Cir.1973); *U.S. v. Hardage*, 982 F.2d 1491, 1496 (10th Cir.1993) (Appellants' Principal Brief, p.26; May 6, 1996). The Mississippi Supreme Court claimed that the trial court did conduct an evidentiary hearing, presumably on the August 30, 1993 hearing on the Defendant's Motion to Enforce Settlement Agreement. ***Yet, it acknowledges that the Petitioners were not allowed to testify.*** The Mississippi Supreme Court dismissed Petitioners' argument on this point referring to a failure to proffer the testimony, stating:

> If a proffer had been made, it is conceivable that the trial judge should have recused himself from an evidentiary hearing on the matter considering the nature of the charges by Wirtz of judicial interference and misconduct and the fact that the judge was a witness and participant in the alleged improprieties".

However, the issue had nothing to do with recusal. The trial court judge already had documents before him wherein the alleged oral settlement agreement was disputed (Appendices "P, Q"). The denial of Petitioners' right to testify only shows that no evidentiary hearing was conducted,

whatsoever. This state action was contrary to the legal authority cited, supra.

Finally, on this point, if courts can impose restrictions on free speech by upholding oral settlement conferences wherein litigants are excluded and afforded absolutely no say, where does this end? This case is especially ominous to future litigants because despite all the evidence which the Mississippi courts swept under the rug and ignored, they were forced to acknowledge by the persistence of Petitioners, that the term restricting their right to complain of Switzer's accounting malpractice and professional misconduct was never mentioned. This issue has not even fully played out in this case because as this Petition for Writ of Certiorari is submitted, the $18,000 sits in an account controlled by the Circuit Clerk of Adams, County, Mississippi and upon Order of the Mississippi Supreme Court, is not to be released until an "appropriate" Order is obtained. ***What other terms lay in wait for Petitioners in order to obtain even this money?***

Petitioners cite many instances which in their opinion denied them due process, supra. Petitioners have shown in the record that the trial judge forcefully confined them in isolation immediately prior to trial on May 13, 1993 and subsequently arbitrarily stipulated that they either accept $ 18,000 or an adverse directed verdict would be issued. The trial judge denied them access to the settlement negotiations and demanded an immediate response, leaving Petitioners without any reasonable alternative other than to submit. Petitioners Lynn and Charlena Wirtz were not allowed to confer with the other Petitioners and would not be allowed to try Switzer and potentially recover compensation for their damages or years of mental anguish. Subsequently, after all efforts were made to prevent trial of Switzer, the trial court judge blatantly signed "Opinion and Orders" submitted by Switzer's attorney, verbatim, which struck Petitioners' evidence from the record and imposed additional terms to the alleged settlement agreement. Perhaps worse was his continued efforts to misrepresent and even falsify the record on several occasions. But two examples found in the Opinion and Order on Defendant's Motion to Enforce Settlement Agreement are references made to falsely indicate that Petitioners Lynn and Charlena Wirtz did participate in the settlement conference and admitted the existence of the settlement agreement (pp.2,4). There are numerous more. The trial court judge called Petitioners' former attorneys to testify against them, without their prior knowledge, and those attorneys disavowed any knowledge of duress or even the existence of conditions they had previously submitted to the trial court in Plaintiffs' Response to Defendant's Motion to Enforce Settlement Agreement, to which they attached Appendix "Q". This scripted charade has been previously referred

to by Petitioners as a "sham", and they reiterate this characterization without qualification.

Finally, Petitioners address the third question presented herein their Petition for Writ of Certiorari. Specifically, has the Mississippi Supreme Court taken action which unconstitutionally infringes upon the Petitioners' First Amendment rights of free speech by ordering that the Petitioners may not institute or pursue any claims before the Mississippi and Louisiana State Boards of Public Accountancy by imposing this term into an alleged, disputed oral compromise and settlement agreement when this term was never a justiciable issue before the state court and admittedly never mentioned in a "settlement conference" wherein the Petitioners were not allowed to participate and wherein the alleged final compromise and settlement agreement was reached?

There is no question that the trial court and Mississippi Supreme Court have restricted the Petitioners' right to free speech. The Opinion and Order on Motion of Defendant to Enforce Settlement Agreement (Appendix "R"; p.102), affirmed in its entirety by the Opinion of the Mississippi Supreme Court (Appendix "C"), expressly prohibits the Petitioners from "instituting, prosecuting, or pursuing any complaint or other proceeding of any kind against the Defendants or any successor firm with the Mississippi State Board of Public Accountancy or the Louisiana State Board of Public Accountancy". The purported basis of this restriction is an alleged oral settlement agreement. Yet, the record proves and even these two "Opinions" admit, this term was never mentioned at any time on May 13, 1993; the date of the alleged settlement agreement. Overbroad does not begin to describe the Mississippi trial court or Supreme Court's "Orders"; there is no basis for the restriction, whatsoever.

As a matter of contract law, the Mississippi Supreme Court's affirmation of the trial court's order is blatantly erroneous. But more importantly for the purpose of this Petition for Writ of Certiorari, the Mississippi trial court and Supreme Court had no jurisdiction to decide claims which were never brought before them. They both fail to recognize the distinction between a "claim" at law or equity before the judiciary, and a "claim" or "complaint" issued to a professional licensing board. The Mississippi Supreme Court can indisputably determine private matters of contract law and Petitioners do not challenge the Opinion on the basis that it cannot enforce alleged oral settlement agreements. However, can the Mississippi Supreme Court or any other state court restrict free speech on the basis of an alleged oral settlement agreement when it is admitted that this restriction was never mentioned or agreed to by the parties?

The record shows that Petitioners care deeply about he practicing standards for attorneys, judges and accountants. Petitioners truly believe that not only has the Mississippi trial court and Supreme Court violated

their constitutional rights, but that their decisions bode ill for the general citizenry, at least in the state of Mississippi. Since the inception of this litigation, Petitioners have considered it a civic duty to present the evidence of Switzer's accounting malpractice and extreme unprofessional conduct to the Mississippi and Louisiana State Boards of Public Accountancy. Petitioners have undertaken no small endeavor to fulfill their duty, and they respectfully ask this Court to reverse the Mississippi Supreme Court in this case, so that their constitutional rights are restored and their efforts have not been in vain.

CONCLUSION

Petitioners believe they have brought forth relevant facts showing conditions which will be of concern to this Court. If those conditions remained unchallenged then ordinary citizens at least in Mississippi, cannot expect certified public accountants, attorneys or judges to feel bound to conduct themselves according to the rules, statutes, or canons of their professions. Nor can any individual who has been financially and reputationally damaged by negligent accounting work, expect restitution or to see court support of the state boards of Public Accountancy.

For whatever reasons, in the courts of Mississippi decorum, fair hearing and rule of law have not been available to Petitioners in this case. The five Petitioners have sought remedy not only for their personal losses of money and peace of mind but have pursued this case with increasing concern for the inarguable deterioration of practicing norms for attorneys and judiciary, ***a fact well-acknowledged by the governor of Mississippi***.

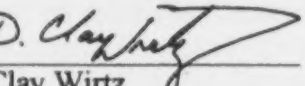
Petitioners believed this case shows two important fundamental issues which call for appropriate action by this Court, those being:

1. A pattern of rampant disregard for rules requiring conformance to truth in records produced by officers of the court.

2. A similar disregard for the rules of procedure and the fundamental constitutional rights of litigants to ***fair hearing and due process, and free speech.***

Petitioners seek from this honorable Court finally to be permitted to present the merits of their case in its entirety, arising from the Defendant's accounting malpractice and subsequent unprofessional conduct, to an unbiased court in a jury trial; nothing more.

Respectfully Submitted By:



D. Clay Wirtz
Counsel for Petitioners

Supreme Court, U.S.
FILED

971912 MAR 23 1998

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997 _____

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ — **PETITIONERS**

VERSUS

DENNIS R. SWITZER, DENNIS R. SWITZER, CPA, LTD. — **RESPONDENT**

On Petition For Writ Of Certiorari
To The Mississippi Supreme Court

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX "A"
STATE OF MISSISSIPPI
SUPREME COURT

MANDATE FROM THE SUPREME COURT OF MISSISSIPPI

To the Adams County Circuit Court - GREETINGS:

On 6th Day of November, 1997, in proceedings held in the Courtroom, Carroll Gartin Justice Building, the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case # 94-CA-00040-SCT
Trial Court Case # 5701

Charlena Wirtz, as Executrix of the Estate of Lena Watson Whitley, Charlena Wirtz, Lynn Wirtz, Elizabeth Wirtz, Andrew Wirtz and Clay Wirtz
vs.
Dennis R. Switzer and Dennis R. Switzer, CPA, Ltd.

Affirmed. Lee, C.J., and McRae, J. Concur in result only.
Appellant is taxed with all costs of this appeal.

MONDAY, DECEMBER 22, 1997:
Motion for Rehearing denied.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

WITNESS, the Hon. Dan Lee, Chief Justice of the Supreme Court of Mississippi; also the signature of the Clerk and the Seal of said Court hereunto affixed, in the City of Jackson, on December 31, 1997, A.D.

"s / Charlotte B. Williams"
Supreme Court Clerk

APPENDIX "B"

FILED APR 26 1996
LINDA STONE
SUPREME COURT CLERK

IN THE SUPREME COURT OF MISSISSIPPI

THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, AS EXECUTRIX OF CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ PLAINTIFFS

CIVIL ACTION NO. 5701
MISSISSIPPI SUPREME COURT
NO. 94-CA-00040

VERSUS

DENNIS R. SWITZER, DENNIS R. SWITZER, CPA, LTD. DEFENDANTS

APPELLANTS' PETITION FOR REHEARING

ON APPEAL FROM: SIXTH DISTRICT CIRCUIT COURT
ADAMS COUNTY, MISSISSIPPI

AFFIRMED: NOVEMBER 6, 1997

Lynn Wirtz
149 Dunbar Road
Natchez, Mississippi 39120

Pro se for Appellants
wk. (601) 445-1139
hm. (601) 442-3583

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I. STATEMENT OF FACTS

This case concerns a complaint of accounting malpractice and damage. The central issue is whether there exists a legally binding agreement or compromise and settlement.

By law, the defendant, Dennis R. Switzer has the burden of proof on this issue, Viverette v. State Highway Commission of Mississippi, 656 So.2d 102 (Miss.1995).. His attorney, Richard D. Gamblin claims that on May 13, 1993 there was a legally binding oral agreement wherein Plaintiffs Lynn and Charlena Wirtz in return for his promise of $ 18,000, willingly conceded to immediately and forever cease any and all actions against his client D.R. Switzer and D.R. Switzer, CPA, LTD., a local business firm.

The Plaintiffs, Lynn and Charlena Wirtz, and their children Elizabeth, Andrew and Clay categorically deny the claims of the defense counsel and again call this Court's attention to the following **undisputed facts**:

(1) There is no document resembling a contract.

(2) There is no contemporaneous court record indicating that any agreement occurred on May 13, 1993.

(3) There is voluminous documentation in the record (see "Appellants' Principal Brief"; May 6, 1996 and "Appellants' Reply Brief"; August 8, 1996; hereinafter "Brief" and "Reply Brief" indicating that no legally binding agreement was or could have been made under the conditions which existed on that day. Switzer's attorney never spoke to the Plaintiffs on May 13, 1993 and was not present when their attorneys, C.G. Holt and GuyN. Rogers supposedly presented to them the terms of the offer. Nor was the trial judge a witness to this crucial moment. Without any question, neither R.D. Gamblin nor Judge Richard T. Watson can claim to know what the Plaintiffs' attorneys told them prior to the dismissal of the jury on May 13, 1993.

(4) Nothing whatsoever of the discussions among trial judge R.T. Watson and lawyers which occurred on May 13, 1993 was recorded. None of the messages sent to the Plaintiffs by the trial judge, nor the Plaintiffs' responses were recorded.

(5) Plaintiffs Lynn and Charlena Wirtz arrived at court on the morning of May 13, 1993 expecting nothing except finally an opportunity to have their case heard before an unbiased judge and jury. All previous offers to settle the case had been ignored by the defense counsel and the Plaintiffs had paid fully their attorneys for representation **through trial.** Instead of trial, the Plaintiffs were ambushed and isolated by the trial judge who proceeded to stipulate to the defense counsel and Plaintiffs' attorneys that

the Plaintiffs' case was "worth only $ 18,000" (against documented losses of over seventy thousand dollars).

(6) Obviously, these conditions and treatment suddenly and unexpectedly imposed upon the Plaintiffs were a shock and entirely against their will.

(7) The trial judge demanded that the Wirtzes concede to an unrecorded promise from the defense counsel that his client would at some future time pay them $ 18,000 in exchange for an immediate cessation of litigation.

(8) Judge R.T. Watson was in charge that day. He demanded by verbal message that Mr. and Mrs. Wirtz accept the promise of $ 18,000 "on the spot" in their room of isolation and that they do so immediately, without any opportunity to consult with their adult children who were Plaintiffs claiming damage but not present at court.

(9) The Wirtzes asked permission to see the judge. Their request was denied.

(10) After some forty-five minutes of heated discussion with the lawyers they had hired, and extreme mental anguish, the Wirtzes verbally submitted to the force and demands placed upon them by the trial judge and the defendant was allowed to again escape trial. (In 1987 he had escaped via an erroneous directed verdict from a prior trial judge).

(11) On that day nor at any other time has there been the slightest indication that the trial judge ever put any pressure upon the defendant or his counsel regarding the amount of money to be offered, or anything else. Throughout this case all the pressure he applied was against the Plaintiffs and the record clearly establishes this fact.

(12) In open court at the first hearing on March 29, 1993 before him the judge demonstrated his long term friendships with two prominent and powerful men aligned with the defense, but never offered to recuse himself. These men are D.C. Bramlette, federal judge and defense witness whose deposition the defense would not allow to be filed, and who was not present at court on May 13, 1993, and W.O. Carter, senior partner of Wise, Carter, Child and Caraway (law firm of Jackson, Mississippi which employs Mr. Gamblin.

(13) The leniency of the Plaintiffs' several offers of compromise and efforts to settle out of court are well established in the record (see "Brief"; pp. 11-12). Their first offer (December, 1984) was to accept only $ 15,000 reimbursement for a check of that amount given to D.C. Bramlette in settlement of a lawsuit for over one hundred thousand dollars which he had filed against Mrs. Wirtz as a direct result of Switzer's negligence but accusing Mrs. Wirtz of "fraud and maliciousness". At that time, Switzer

had one million dollars of malpractice insurance but refused to discuss the matter.

Mr. Bramlette had not named Switzer as a co-defendant. Mrs. Wirtz first learned during the discovery process years later that Switzer and Bramlette had been discussing Switzer's erroneous accounting report on a daily basis during its preparation. When Switzer completed the report he provided it to Bramlette without discussing it with his client Mrs. Wirtz. All these matters and many more gross improprieties have been shown to this Court in the Appellants' "Brief" and "Reply Brief".

(14) On May 13, 1993 the defense counsel was well aware that the Plaintiffs had long since entered into the record that they felt duty bound to send information about Switzer's accounting performance and his conduct after the fact, concerning the erroneous accounting report, to his licensing boards in Mississippi and Louisiana. Nevertheless, the subject was never mentioned by Switzer's two attorneys or by the trial judge on May 13, 1993 but was added along with various other conditions never mentioned, in a draft of settlement prepared a week later by Gamblin.

Mr. and Mrs. Wirtz had left court on May 13, 1993 wondering what the defense counsel and trial judge would attempt to impose upon them. In the Plaintiffs' "Brief" they call the added terms and conditions "amazing and legally unconscionable", and hereby confirm that description (see "Brief"; pp. 10-11). The Plaintiffs did not know what the trial court expected them to do after May 13, 1993 and they do not know now what this Court expects them to do.

(15) Shortly after May 13, 1993, the Plaintiffs' attorneys (C.G. Holt and G.N. Rogers, Jr.) hired to protect their rights and interests, tried to convince them to sign Gamblin's "Agreement". C.G. Holt stunned his clients by announcing in open court that he and Rogers had tried to get the Wirtzes to sign Gamblin's draft (see "Brief"; p.11). When Holt and Rogers showed up for the hearing on Gamblin's "Motion to Enforce Settlement Agreement" on August 30, 1993 they joined the defense counsel and trial judge in an ongoing zealous effort to coerce the Wirtzes into signing Gamblin's "Agreement", verbatim (see "Brief"; p. 11-16).

Plaintiffs' Note: This is the same C.G. Holt who after filing papers soundly supporting the fact that the trial judge had threatened the Wirtzes with a directed verdict for Switzer on May 13, 1993; later on April 18, 1994 testified against them without their knowledge and incredibly supported the trial judge and defense counsel by swearing as an officer of the court that he was unaware of any duress being imposed upon the Wirtzes on May 13, 1993 (see "Brief"; p.12; 14-16; 43-46). He also falsified the record on August 30, 1993 when he agreed at the insistence of

the trial judge that the Plaintiffs had not expressed a sense of duty to the State Boards of Public Accountancy until August 30, 1993 (see "Brief"; p.13; 42-46).

II. ANALYSIS OF THE DEFENSE

The following facts were devastating to Switzer's case:

(1) On March 2, 1984 Mr. and Mrs. Wirtz met with Switzer to inform him of the lawsuit that D.C. Bramlette had filed against her. Prior to this meeting, Mrs. Wirtz had been on good terms with Switzer. However, Switzer was unexpectedly accompanied by his attorney, John Mulhearn (see "Brief", pp.4-5). It is at this meeting, when Mrs. Wirtz asked Switzer for his advice and help, thatMr. Mulhearn spoke for Switzer, telling Mrs. Wirtz that "life wasn't fair" and making it clear that Switzer would admit nothing and do nothing to help her.

Mr. Gamblin addresses this problem by falsely asserting in a brief to the Mississippl Supreme Court that the defense was never tendered nor Switzer given any opportunity to help Mrs. Wirtz fight the lawsuit. He then built his case on this falsehood by citing cases wherein litigants had failed to tender the defense ("Brief", p.6).

(2) Later, after a court judgment against her, Mrs. Wirtz had paid D.C. Bramlette $ 15,000 to settle his lawsuit for over one hundred thousand dollars, caused by Switzer's negligence.

Mr. Gamblin addressed this problem by asserting in his documents and statements at court that the $ 15,000 claim against Switzer was for "non-contractual implied indemnity" and had nothing to do with a lawsuit. The fact that the cause numbers were identical did not impede him ("Brief", p.7).

(3) Mr. Gamblin had known for many years that the Wirtzes had expressed a sense of duty to the Mississippi and Louisiana State Boards of Public Accountancy.

Mr. Gamblin had to admit that he never called this to the attention of the trial judge during the alleged "settlement conference". Mr. Gamblin and this Court place great emphasis upon his claim that the Wirtzes "did not except any terms from the (alleged) agreement". But, after drafting the "Opinion and Order" which Judge Watson signed verbatim and in which it is falsely stated that "the parties participated in a settlement conference on May 13, 1993", Mr. Gamblin and the judge were compelled to admit that, in fact, the Plaintiffs were denied

permission to participate. The Plaintiffs essentially had no knowledge or understanding of what was occurring in chambers and were allowed no time or opportunity to learn the facts of what was happening so as to try and cope with the situation. One week later, when Mr. Gamblin submitted a "Release" which imposed terms preventing the Plaintiffs from filing complaints about Switzer to the State Boards and placing various unreasonable demands upon them, the Plaintiffs objected vehemently and refused to sign the "Release" ("Brief", pp. 10-16).

(4A) The Wirtzes were ambushed on May 13, 1993.

(4B) They were isolated by the trial judge.

(4C) They were told by their attorneys that the trial judge was threatening to direct a verdict against them if they did not accept $ 18,000.

(4D) They were denied permission to see the judge.

(4E) They were pressured to accept a verbal promise from a person they knew they could not trust, in exchange for dropping a case to which they had devoted over eight of the last years.

(4F) They had not sought any settlement that day and what was frenetically happening was without their prior knowledge or current understanding, and against their will.

(4G) They had not authorized their lawyers to settle anything.

(4H) The $ 18,000 stipulated by the judge was a small fraction of the losses his client's
negligence had cost the Plaintiffs.

(4I) The Plaintiffs had always shown that they have a sense of duty to the State Boards of Public Accountancy.

(4J) The aforementioned conditions necessarily caused the Wirtzes great consternation.

Mr. Gamblin addressed these problems concerning the fundamentals of contract law by writing an "Opinion and Order", which trial judge R.T. Watson signed. In that document it is falsely asserted that ***"the parties participated in a settlement conference with the court"*** *and* ***"the parties agreed to settle <u>all</u> remaining claims"****. When it became immediately apparent that the Wirtzes would not compromise the rights that they had hired their attorneys to protect, the trial judge summoned C.G. Holt to swear as an officer of the court that he had been unaware of any duress being imposed upon his clients on May 13, 1993 ("Brief"; pp.11-16, 34, 38, 43-47).*

(5) There were pointed displays of sympathy and camaraderie between Mr. Gamblin and thetrial judge, in front of the Plaintiffs in open court and the Plaintiffs took strong exception to those displays.

The trial judge brushed this aside as being entirely proper. The Plaintiffs know that it was not ("Brief"; pp. 8, 44).

(6) The Plaintiffs might enter into the record things detrimental to Switzer's case if they were allowed to speak at any of the "hearings" at court.

This problem was solved for Mr. Gamblin by the trial judge simply denying Lynn Wirtz's requests through counsel, to take the witness stand or otherwise be heard. These requests were made three separate times during two occasions at court. All were denied without any explanation. The lawyers hired by the Plaintiffs did not "proffer their testimony", thus allowing the judge to silence their clients.

(7) Similarly, if the Plaintiffs were allowed to designate the documents of their choice to be forwarded in the record on appeal to this Court, there would be serious problems.

This Mr. Gamblin solved by filing a "Motion for Sanctions" and an "Objection to the Statement of the Evidence" wherein he called for the trial judge to strike a large number of documents the Wirtzes wanted forwarded in support of their appeal. The Plaintiffs did not attend these "hearings" because the "Motion" and "Objection" were ill-founded and their written responses were sufficient, and the trial judge consistently had refused to allow them to speak anyway.

*Mr. Gamblin then produced "Orders" to strike the Plaintiffs' documents from the record, and these were signed by the trial judge. **Despite pending appeals of these orders**, an attorney working for this Court and who formerly practiced law in Natchez, Mississippi telephoned the local circuit clerk and told him to forthwith forward only the documents approved by the trial judge and defense counsel to this Court.*

*The Plaintiffs appealed these orders to this Court but their appeals were denied. **Thus, the defendant was allowed to say which issues could be appealed and largely determine which documents could be used by the Plaintiffs in their appeal.***

The Plaintiffs would at this point again call this Court's attention to the documents stricken by the trial court on behalf of the defendant ("Brief"; pp. 14-18).

(8) The lawyers (C.G. Holt and G.N. Rogers, Jr.) hired by the Plaintiffs had witnessed the conditions imposed upon Lynn and Charlena Wirtz on May 13, 1993 and probably knew that the surprise, duress, lack of record, etc. should invalidate any claimed contract.

However, the Plaintiffs' attorneys elected to betray their clients instead of upholding their professional oaths to represent them. These

betrayals are blatant and well documented ("Brief"; pp.11-16, 34, 38, 43-47).

(9) The libelous deposition of federal judge D.C. Bramlette was taken at Mr. Gamblin's request on May 6, 1993. As Plaintiffs' stated in their "Brief" (p.9), "that deposition was of such nature, content, and purpose as to cause the Plaintiffs to take subsequent continued exception thereto, and to Judge Bramlette's involvement and intervention in this case in general (CP 585, p.5; CP 491, Memo of June 4, 1993)".

The Plaintiffs had been told by Gamblin that this document or excerpts therefrom would be read to a jury with the deponent absent from trial (preventing opportunity for cross-examination) if the Plaintiffs proceeded to trial. The deposition contained falsehoods defamatory to Mrs. Wirtz, and was a transparent attempt to intimidate the Plaintiffs.

Mr. Gamblin decided against filing that nefarious deposition and objected violently when the Plaintiffs indicated a desire to do so ("Brief"; pp.9, 16-17, 23, 41, 44-45, 48).

(10) Mr. Gamblin's client was clearly culpable in a prima facie case of accounting negligence and resulting damage; ex parte divulgence concerning his client's affairs to a known adversarial attorney; irresponsible flight from professional duty; and violation of several provisions in the Mississippi and Louisiana State Boards of Public Accountancy code of ethics for CPA's. These details of Switzer's accounting performance and conduct would not likely be well received by a jury.

Secondarily, the events of May 13, 1993 could not meet the requirements of fundamental contract law, for any "binding legal settlement agreement".

Mr. Gamblin addressed these obstacles by preparing a litany of documents containing the required falsehoods, and especially by demonizing the Wirtzes by depicting them as antagonists to attorneys, judges and the legal system. Laying aside the irrelevancy of these prejudicial statements made in various documents, the facts show the contrary. The Wirtzes have at various times throughout this affair, paid well and relied upon no less than nine different attorneys. It is their faith in and loyalty to our system of justice which explains their refusal to give up. This Court has expressly stated that the Wirtzes fail to understand the legal system. Admittedly, the Plaintiffs have not grasped how the courts can so tolerate deliberate falsification of records by attorneys and judges, or how Plaintiffs can be denied due process before a jury based upon an alleged settlement agreement reached without their participation and consent.

III. ARGUMENT

The Appellants have thoroughly read this Court's "Opinion" of November 6, 1997. The first general comment they would make is that they are surprised that this Court repeats the statement that it can see "no merit" in the Plaintiffs' arguments. Secondly, there are a number of inaccuracies, some subtle, some obvious, but every one of which is in favor of the defendant and which the Plaintiffs will address individually. Thirdly, and most striking is the resounding approval by this Court of each and every activity of the defense counsel, trial judge, and of the lawyers hired by the Plaintiffs to advocate for them and otherwise protect their rights and interests.

If the activities which undeniably occurred in the trial court under Judge Richard T. Watson are to be reinforced by this Court as being fully acceptable, this fact must be generally known. However, this Court has invoked M.R.A.P. 35-A stating that this "Opinion" is not designated for publication and cannot be cited. Without question, this case satisfies the mandatory criteria for designation for publication. Firstly, this Court is establishing a new rule which has never been recognized in any court of law; namely, that parties can be prohibited by a judge from participating in settlement negotiations wherein agreements between attorneys are reached binding the parties. Secondly, this Court acknowledges that it is in the public interest for State licensing boards to review cases of professional malpractice. Thirdly, this Court is establishing a rule that the judicial system has jurisdiction to determine a person's right to bring complaints before a professional board; when it is undisputed that this claim was never submitted to the court for judicial resolution. **This kind of denial of First Amendment rights of free speech is absolutely unprecedented.**

IV. SPECIFIC INACCURACIES

The following are specific inaccuracies in this Court's Opinion which are strikingly similar to the inaccuracies produced by defense counsel R.D. Gamblin in various documents:

(1) p.2: The statement "Wirtz engaged and dismissed several attorneys following the Mandate from the Supreme Court which resulted in three continuances of the case" is quite incorrect and intentionally prejudicial (CP 403). From the origin of this case in Chancery Court to the present, the Wirtzes have paid a total of nine attorneys a sum of almost $ 50,000. The Wirtzes asked two of those attorneys to withdraw. The time span was almost thirteen years. The Wirtzes have filed two,
not three continuances since the Supreme Court's mandate in 1991. Yet, this Court does not provide any analysis whatsoever of the defense tactics

which were specifically designed to drag this case out and exhaust the Plaintiffs' resources and which have been well documented.

(2) p.2: The statement "The next day, Wirtz retained the services of Guy N. Rogers and Christopher G. Holt" is quite incorrect and intentionally prejudicial. Those attorneys were retained **several months** prior.

(3) p.3: In the statement, "Following a brief discussion among the attorneys with confirmation from the respective clients, an agreement was reached . . ." the word allegedly should be used. This Court adopts the language repeated ad infinitum by Mr. Gamblin which presumes that an agreement was reached so as to eliminate that issue from this Court's consideration. Apparently, this strategy was successful. However, this Court has ignored the obvious fact that the Plaintiffs always disputed the fact that any settlement agreement was reached. This Court has entirely failed to indulge in any legal analysis which deals with the central dispute of this case; namely, do the circumstances of this case give rise to a binding legal agreement. For this reason, in this Court's "Statement of the Case" and throughout any section of the Opinion wherein it is not drawing conclusions, **it is entirely inaccurate for the facts not to state that the agreement allegedly reached was disputed by the Plaintiffs.**

(4) p.3: The statement "The terms of the (sic) agreement were not put into writing at that time, and no contemporaneous record of the (sic) settlement was made" again presumes the agreement existed. Of course, this begs the question, if an agreement was reached, why wasn't some contemporaneous writing or at least a minute entry entered into the record? **The answer is that the attorneys and trial judge were so certain that the Plaintiffs would not agree to what was being discussed that they would not allow them to even witness the "settlement discussions".** Their best strategy to prevail in this case was to ***conspire*** to force verbal submission and then a settlement at a later time. The telephone call from R.D. Gamblin to Plaintiffs' attorneys the night before trial at the very least raised extremely disturbing questions ("Reply Brief"; pp,9-10).

(5) p.3: In the statement "Following the oral agreement, Switzer submitted a written settlement agreement and release to which Wirtz violently objected", the words "alleged" should precede "oral" and "proposed" should precede "written". There is no subtlety here. Again, it is the result of Mr. Gamblin's disingenuous strategy to repeat something until this Court believes it is the truth.

(6) p.3: The sentence "The major problem with the wording revolved around the desire of Wirtz to seek disciplinary action against Switzer with

the Mississippi and Louisiana State Boards of Accountancy" is a partial truth intended to mislead. It was not a "problem with the wording", but instead a problem because the Plaintiffs had submitted under duress and had not relinquished the right never mentioned on May 13 by the attorneys or judge and Mr. Gamblin's "Release" would preclude the Plaintiffs from exercising this right. Also, Wirtz was not "seeking discipline" against Switzer, but rather to provide the boards with information for them to decide if discipline was warranted. Finally, the Wirtzes had the same problem with all the other added conditions ("Brief"; pp.10-11). It was not until after all these problems were thrust upon them that the Wirtzes decided to still give Mr. Gamblin a final chance to settle by taking out all the added conditions; but he refused that offer and the Wirtzes withdrew it ("Brief"; p.13).

(7) p.3: Concerning the statement "After months of unsuccessful negotiations, Switzer filed a Motion to Enforce the Settlement Agreement on August 19, 1993" the Plaintiffs make the following observation: The word "the" should not precede "Settlement". Gamblin's motion was styled "Motion to Enforce Settlement Agreement". Again, the motion was to enforce (force) an alleged settlement agreement disputed by the Plaintiffs.

(8) p.4: After the statement "In addition to Switzer and his attorney, the trial judge asked Christopher Holt to appear at the hearing" the following should have been added: The Plaintiffs were not notified by the court or by Holt that he would attend the hearing". In fact, Mr. Holt told Lynn Wirtz the Friday before the Monday hearing when asked if he planned to appear at the hearing, "not unless you subpoena me" ("Brief"; p.15). Therefore, Mr. Holt deliberately misled Lynn Wirtz so that he could deny that he had witnessed duress on May 13, 1993 without cross examination and then lied on record to indicate that he had advised Mr. Wirtz that he would appear at the hearing.

(9) p.5: In their "Brief", the Plaintiffs listed eleven major issues. The Opinion lists only three, and the Plaintiffs object to the degree of truncation which occurred, especially regarding the procedural errors (May 13, 1993 affair, lack of any **proper** evidentiary hearing, denial of admission of testimony, misapplication of M.R.A.P. 10, and failure to notify Plaintiffs of forthcoming adverse testimony by former attorney; which was indeed a "sham").

(10) pp.5-6: The description of the "dispute" is **entirely erroneous**. It "arose" when D.C. Bramlette zealously attempted to force the executrix (Mrs. Wirtz) and her attorney (F.A. Johnson) to distribute oil monies and properties before Switzer had calculated tax liabilities, for which the I.R.S. would hold Mrs. Wirtz responsible. Adams Chancery Court records are

perfectly clear on this (Cause No. 30,726). That record shows that Mrs. Wirtz **never claimed** any of those moneys or properties despite a clause in the will which Bramlette's own legal advisor admitted gave Mrs. Wirtz firm legal claim to five-sixths of the oil properties. Those properties all went to Bramlette's clients in due course, just as the record shows Mrs. Wirtz intended from the outset.

What appears on p.5 is the same false wording previously used by R.D. Gamblin to deceive, and prejudice the record.

The compromise was urgently sought by Bramlette, not Mrs. Wirtz. The reason he sought it was his fear of the wording in the will, and the fact that his deadline on the two-year statutory limit for making good his threats to contest the will was two days away (January 5, 1984). The record shows all this and it shows that Mrs. Wirtz ignored Bramlette's threats of will contest. The Plaintiffs can produce the entire record showing the falsity of what is stated on pp.5-6 of the Opinion (see "Brief", pp.3-5 for an entirely true and unembellished (and referenced) showing of the facts concerning the "dispute".

Note: The statement "the heirs demanded a disbursement of the remaining funds, and when the executrix refused, they filed a Complaint in the Chancery Court of Adams County demanding payment of the amount withheld" is entirely misleading. To the best knowledge of all the parties at the time, **there were no remaining funds.** If Mrs. Wirtz were to follow Switzer's instructions to pay the I.R.S. some $ 56,343 taxes then **Switzer's error promised the heirs money to which they were not entitled.** Bramlette well knew this when he filed the suit against Mrs. Wirtz taking advantage of Switzer's error; a highly unethical act, especially since he knowingly and falsely accused her of fraud and "maliciousness" in the public record, thus forever damaging her good name and claiming her personal property (she would have to pay the I.R.S. from her own pocket, according to Switzer's instructions). Appellants' "Brief" previously explained these important facts to this Court ("Brief"; pp.3-6).

(11) p.6: The statement "On June 18, 1985, the Estate filed suit against Dennis Switzer asserting claims of professional malpractice, including negligent preparation of the schedule of "Net Oil Income Attributable to Beneficiaries, October 31, 1983" is incorrect. "The Estate" was not the Plaintiff. The Wirtzes themselves sought recovery of their own money which they had paid to settle a lawsuit filed by Bramlette against them due to Switzer's error.

(12) p.7: The statement "This motion was never addressed by the trial court because a hearing date was never set by the attorney representing Wirtz" is only half-true. Neither did Mr. Gamblin honor his gentleman's

agreement and communicate with the Plaintiffs to set the hearing as he had promised ("Brief"; p.7). The Plaintiffs made the mistake of taking him at his word since he had put it in writing ("Brief"; p.7).

(13) p.7: The statements "After three continuances due to Wirtz's lack of trial counsel, Switzer filed a Motion to Dismiss on March 15, 1993" and "Following the initial trial in Chancery Court, Wirtz employed and subsequently discharged at least four different attorneys" are incorrect and prejudicial. Wirtz had only two continuances due to difficulties obtaining trial counsel, and kept the trial court very closely informed while diligently seeking counsel. The court never expressed the slightest dissatisfaction during this time. There was no "trial in Chancery Court". Throughout this entire case and prior Chancery Court activity the Wirtzes have paid nine attorneys a total of almost fifty thousand dollars. Two of these nine were asked by the Wirtzes to withdraw, for good reason.

At this point, considering the number of errors and prejudicial statements contained in this Court's Opinion and the all-too-familiar wording; the Plaintiffs would ask with respect where this information came from.

(14) p.7: The statement "The trial judge was quite agitated with the state of the case especially the continued delay of trial due to Wirtz's lack of counsel" omits a key fact: The trial judge had before him a Plaintiffs' Motion for Partial Summary Judgment, July 13, 1992 and a letter from the defense counsel, July 20, 1992 to the court asking for a continuance and stating a gentleman's agreement to work with the Plaintiffs to set a date for a hearing on the motion. Although these facts were never mentioned by Mr. Gamblin or the judge, perhaps this is why Mr. Gamblin began his argument on the motion to dismiss by admitting that his motion was ill-founded ("Brief"; pp.7-8).

At this point, the Plaintiffs respectfully call attention to the fact that this Court's Opinion is "riddled" with partial truths. In their "Brief" the Plaintiffs told the whole story, and referenced the documents establishing the whole and unembellished truth. Plaintiffs by no means intend to be hypercritical, but all of these errors and omissions are crucial and not derived from the record.

(15) p.7: In the last sentence, again this Court states in the "Statement of Facts" section of the Opinion that a settlement was reached without acknowledging that this is a **disputed issue of fact.** What is not said, is that one of the reasons the judge and defense counsel were motivated to prevent trial was that either Cathy Reed would testify or the devastating testimony of expert CPA Wayne Galloway from the first trial would be entered into evidence and, **Switzer had no expert witness who would**

attempt to rehabilitate his performance and conduct to a jury. This Court draws the unfounded conclusion that it was Wirtz who had expert witness problems. Quite the contrary, it was Switzer who did not have an expert witness. Which begs the obvious question: "Why would an experienced defense attorney such as R.D. Gamblin proceed to trial in a professional malpractice case without an expert witness to rebut the Plaintiffs' experts unless he had assurance that the case would not be tried?" And, "Why was he so confident that the case would not be tried when the Plaintiffs had given no indication that they wanted anything but trial at that point"?

(16) p.8: The statement "Lynn Wirtz and Charlena Wirtz asked the court for permission to participate in the settlement conference, but the trial judge denied their request" is incorrect and highly misleading. The Wirtzes did not request "permission to participate" in anything; they requested permission to see the judge. This wording is that of the defense counsel.

(17) p.8: The second paragraph is **totally incorrect.** The Wirtzes approved of nothing which was happening. They could not even grasp what was being suddenly imposed upon them ("Brief"; pp.9-10). What has been entirely lost upon this Court is that the only people who can claim to know what the Wirtzes wanted, said, or approved of are the Wirtzes and their attorneys. Neither the trial judge nor the defense attorney ever spoke to them or were spoken to by the Wirtzes. Thus, this case involves a dispute between the client and their attorneys which necessitates an evidentiary hearing when a settlement agreement has been alleged.

(18) p.8: The statement "Subsequently, Switzer's attorney prepared a proposed release and forwarded it to Wirtz's attorneys: It is noted here that the Opinion uses the correct term "proposed release" whereas on p.3 it terms' Mr. Gamblin's draft "a written settlement agreement and release". The distinction is not insignificant.

(19) p.8: The wording in paragraph #3 is entirely incorrect and misleading. The language of the proposed release was designed to, and would preclude a complaint. Also, this objection was no more "primary" than the Plaintiffs' objections to assuming all blame for damages to the estate actually caused by Switzer's negligence and flight from professional responsibility, or to indemnifying him against any future lawsuit by parties unknown, and founded on the same negligence ("Brief"; pp.10-11).

Secondly, the statement "Wirtz admitted that a settlement agreement was reached" is utterly false. A reading of the record will show that:

(A) Wirtz immediately and has always objected to all that occurred on May 13, 1993, and gives entirely legally valid reasons for doing so.

(B) Wirtz has never denied verbally submitting to the demands and threats of the trial judge on that day, but has always denied that any legally binding agreement was made.

(C) In a **later** effort to end the animosity and legal travesty, the Wirtzes decided to give the defense counsel a final **opportunity to discuss** a full or partial settlement if he would cease pretending he had already obtained a right to all sorts of added terms and conditions. He refused that offer and proceeded to work with the trial judge to force the Plaintiffs to submit to all his terms.

In typical fashion, by harping on their use of the word "agree" and its forms, the defense counsel attempted to use against the Plaintiffs' their good-faith offer to later discuss compromise. Plaintiffs herewith refer the reader to their "Brief"; pp.9-13. They also offer the following analogy: An armed robber demands another man's wallet. The victim says, "O.K., O.K." and hands over his wallet, but fails to verbally "reserve" the right to his car, which the armed robber decides to take also. The armed robber then hands a few dollars from the victim's wallet back to the victim. The court rules that since he "agreed" to give up his wallet, "accepted" the car fare and said nothing about the car, he must give up both without complaint. The analogy may be absurd but so are the claims of a legally binding agreement under the conditions which existed on May 13, 1993.

(20) pp.8-9: The statement "Holt told the court that the problem arose from a sense of duty on the part of the Wirtz family to file disciplinary actions with the Mississippi and Louisiana Boards of Accountancy to protect the public from further negligence by Switzer" was an inaccurate statement made by Mr. Holt . "Disciplinary actions" are not filed by the complainants; and the purpose of the Wirtzes in not giving up their rights was so as to provide the boards with information needed to assist them in protecting the business community and public against negligence and irresponsibility after the fact, not only by Switzer, but by any CPA in the future. Also, the comment about Mr. Holt's "admission" is incomplete and misleading. First, the statement was inaccurate. Secondly, Holt had already gone over to the other side ("Brief"; p.13).

(21) p.9: The last sentence, "The trial judge did not impose any sanctions on Wirtz but the Statement of Issues was stricken from the record in accordance with Supreme Court Rule 10(b)(4)" is incorrect. Severe sanctions were imposed in that Mr. Gamblin was awarded that which he sought; the striking from the record of a number of key

documents designated by the Plaintiffs for their appeal (and not just their "Statement of Issues", as this sentence indicates).

V. SUMMARY ARGUMENT AND CONCLUSION

At this point, Plaintiffs make the following statements:

1. The 25 pages allowed for this "Petition for Rehearing" does not allow a continuation of the foregoing detailed list of exceptions, but any reader can readily see the great disparity between the documented and complete list of facts shown in the Appellants' "Brief"; and this Opinion, which totally agrees with everything said and done by the defense counsel, trial judge and one of the lawyers hired by the Plaintiffs.

However, the Plaintiffs' arguments are not founded upon a difference of viewpoint and interpretation but upon two things (1) law and procedure and (2) documented facts.

2. The Plaintiffs are entirely satisfied that they have placed all the necessary relevant facts before this Court and that in their briefs and this "Petition for Rehearing" they have exposed most of the sundry falsifications of record and the obvious fact that the defendant has not met his burden of proof regarding the existence of a legally binding agreement or contract. Nonetheless, this Court asserts "the record is clear that Wirtz **accepted** the settlement offer of $ 18,000 and then rejected the agreement at a later date after being informed that the settlement could preclude any disciplinary action against Switzer" (p.10; Opinion).

Here is the **documented** truth ("Brief"; pp.9-10): On May 13, 1993 Wirtz "accepted" nothing (see Black's 6th Ed., p. 12). "Submitted" is the proper word. The defense counsel did not "offer" anything. The $ 18,000 was stipulated by the trial judge as the lesser of two evils placed before the Plaintiffs to choose between, the other being a directed verdict dismissing their case; i.e., extortion.

3. Plaintiffs did not "reject the agreement at a later date". First, there was no "agreement" (meeting of minds, freewill concession). Secondly, what they rejected was a **proposed release** containing various terms and conditions never mentioned on May 13, 1993. Finally, the preclusion of disciplinary action was obvious in the proposed release, the Plaintiffs rejected it immediately without needing to be "informed" by anyone.

4. On pp.12-13 of this Court's Opinion on the subject of **Duress**, it states: "As suggested by Switzer, Wirtz had some serious expert witness problems shortly before trial. An expert is required to prove malpractice on the part of an accountant, and Wirtz had one expert who was most likely unavailable (literally but not legally) and another who was noticed to the defense only two days prior to trial". This statement is a vague

reference to an argument Mr. Gamblin made in his brief based upon a Hearsay Exception rule which was entirely decimated by the Plaintiffs in their "Reply Brief"; pp.14-15. The defendant has never cited any legal authority which would preclude the use of previous expert witness trial testimony on remand, because it does not exist. Furthermore, as covered in the Plaintiffs' "Brief"; p.37, the trial judge cannot choose the Plaintiffs' expert witness or allow the defendant to choose the Plaintiffs' expert. This is an absurd legal analysis of this issue which has been previously offered by Mr. Gamblin. One thing is certain: Switzer imminently faced the prospect of a jury hearing either the testimony of a lady (Cathy Reed, CPA) who recently had served five years as chairperson of the Mississippi State Board of Public Accountancy, or the devastating recorded trial testimony of W.C. Galloway, CPA, who helped write the rules for Mississippi CPA's. A jury was not likely to be sympathetic to Switzer's negligence and then his abandonment of his client whom he had placed in extreme difficulty as would be described by Mrs. Wirtz and other witnesses. Switzer had no expert witness and his sole witness (D.C. Bramlette) had more important business elsewhere ("Reply Brief"; pp.14-17). For this Court to conclude that expert witness problems were the source of any duress Wirtz might perceive is absurd. First of all, Switzer had the expert witness problems, not Wirtz. Secondly, Wirtz has identified the source of the duress.

5. This Court's analysis on the issue of the Plaintiffs' attorneys authority to settle the case entirely misses the point. The Plaintiffs' attorneys never claimed to have settled the case or to have had the authority to do so. All the Plaintiffs' attorneys were doing on May 13, 1993 was relaying the judge's threats and other messages to the Plaintiffs and returning to the judge with the Plaintiffs' responses. If the Plaintiffs' attorneys thought they had authority to settle the case, why didn't they make the defense counsel a counter-offer? When the judge stipulated that the Plaintiffs would get $ 18,000 or an adverse directed verdict, the Plaintiffs' attorneys did not tell the judge that would or would not be acceptable. They ran back to their clients and told them what happened in chambers, relaying the judge's threats. **They had been paid $ 12,000 to prepare for and represent them at trial.** This issue is covered in "Appellants' Reply Brief"; p.21, #12. This Court's statement that "the record indicates that the attorneys for Wirtz did have the authority to make the agreement" (Opinion; p.14) is insupportable. Contrarily, every document post dating May 13, 1993 submitted by the Plaintiffs demonstrates that their attorneys did not have authority to agree to the

terms set forth by Mr. Gamblin in the proposed release; and furthermore, these attorneys nowhere claimed to have had that authority.

6. The Plaintiffs have no problem with the policy in Mississippi and every other jurisdiction favoring settlement agreements as stated in D.H. Overmeyer Co. v. Loflin, p. 14; Opinion. However, a judge calling the parties together to impartially serve as conciliator is one thing. Nothing resembling this occurred on May 13, 1993. Regarding McManus v. Howard, p.15, Opinion, Plaintiffs specifically have alleged mistake and overreaching.

7. The Plaintiffs had no obligation whatsoever to "reserve" or "except" their fundamental right of free speech regarding sending information to the state boards of public accountancy, and the trial judge and defense counsel had no logical reason nor **right to assume** that the Plaintiffs had given up that right for a pittance. In Plaintiffs' view, the idea is quite absurd ("Brief"; pp.33-35).

8. Concerning the footnote on p.15, Opinion: C.G. Holt full knew that the trial judge was pressuring him to agree to something which would falsify the record whether the judge who had just claimed to have "read the entire record in this case" ("Brief"; p.13) was aware of it or not. The point is that Mr. Holt knew it was in the record, Mr. Gamblin knew it was in the record, and the judge either knew it was in the record or at least should have known the Plaintiffs in a malpractice case have a right to provide information to licensing boards. Regarding this point, It did not matter at all that the motion for partial summary judgment was "never set for hearing"; that motion was an important part of the court record.

9. The Plaintiffs wonder how this Court has concluded that neither Gamblin nor the trial judge had any obligation to bring the subject up on May 13, 1993 but that the harried Plaintiffs did. Again, this is fully covered in "Appellants' Brief"; pp.33-35; but because this Court's Opinion so entirely misses the point in relying on Downey v. Clauder, cited by Mr. Gamblin, Plaintiffs point out the following: Clauder intended to settle his legal malpractice case specifically to avoid disciplinary proceedings. He refused to enter into the agreement because he discovered that disciplinary proceedings were pending before the Cincinnati Bar Association. While Downey withdrew that complaint previous to the execution of the settlement agreement, he did not simultaneously withdraw a complaint pending with the Cincinnati Bar which was unknown to Clauder. The court determined that without the settlement of all remaining claims (including the disciplinary complaints) the agreement had little value to Clauder.

In this case, there is no way the trial court or this Court reasonably could reach a similar conclusion. First of all, Switzer was getting away virtually "scot-free" for the paltry sum of $ 18,000 when his negligence had cost the Wirtz family documented losses totaling over $ 70,000 and mental anguish beyond measure. Mr. Gamblin knew this and that is why he did not raise the issue of the state boards. Second, in this case there were no pending complaints filed. Third, Downey knowingly withheld vital information which he should have known would end the settlement proceedings; whereas, Wirtz entered his intent to institute complaints in the record. Fourth, the Wirtzes were not allowed to participate in their negotiations. Fifth, in Downey the disputed issues were negotiated, not added to the settlement after the fact when the claim was never a justiciable issue before the court. There is a distinction between a claim at law or equity and a "claim" made to a professional board. There is no overlapping jurisdiction. Please refer to the Plaintiffs arguments on this point submitted in their brief, mentioned above.

10. Apparently, Switzer, Gamblin and the trial judge all believe that provision of information to Switzer's licensing boards would result in (possibly severe) disciplinary action and Plaintiffs also believe that is true. This fact alone strongly tends to negate the defense claims of a binding legal contract on May 13, 1993. **$ 18,000 in settlement of losses of over $ 70,000, many years of mental anguish, and forfeiture of rights regarding the boards clearly would comprise an unconscionable contract.**

11. The statement that "the fact that the judge knows prominent members of the legal community has little bearing on his ability to fairly administrate a case" (Opinion; p.20) is a **gross distortion**. The Plaintiffs never objected to Judge R.T. Watson's knowing D.C. Bramlette or W.O. Carter. What they obviously objected to was the judge's effusive display of these friendships and affection in front of them in open court, a demonstration counter to judicial canons, and for good reason. This was only the first of many "signals" sent by this judge to the Plaintiffs that they had better submit. The Plaintiffs are very concerned that this Court takes the unequivocal position that this and **every other** activity of the trial judge and defense counsel are perfectly acceptable. Plaintiffs are entirely satisfied that such conduct, falsification of records, intimidation of litigants, violation of fundamental rights, etc. are not acceptable to the citizens of Mississippi.

12. This Court has said, "there is no hint of impropriety in the record" (Opinion; p.21) and has indicated that the Plaintiffs' arguments have "no merit" (Opinion; pp.12, 22).

The Plaintiffs of course do not accept this conclusion. Time will tell whether the activities of attorney R.D. Gamblin and Judge R.T. Watson are accepted as representative of accepted norms for conduct of Mississippi attorneys and especially of judges, who must serve the public and control attorney conduct at court. The conduct of federal judges must become a concern of the public. Their activities must be above reproach.

The Plaintiffs in this case have assumed that they must pay over seventy thousand dollars and invest thousands of hours of their family time to assist the authorities in their state to keep ethical control of the legal, judiciary and accounting professions, which obviously are now quite out of control.

Without any further discussion, and with all due respect the Plaintiffs in this case ask this Court to:

(1) After the defense counsel's time to respond has expired, assemble **en banc** to acknowledge the importance of this precedent case for Mississippi to the future actual practicing norms for judges, attorneys, and CPA's regarding their professional performance and conduct.

(2) Carefully consider what is in this "Petition for Rehearing" as sell as Plaintiffs' "Brief" and "Reply Brief" and all that the defense counsel has placed before this Court.

(3) Keep well in mind the undisputed and inescapable facts now established in the record as to what occurred at court on May 13, 1993 in lieu of trial, with Judge R.T. Watson presiding, and weigh those facts against the established fundamental requirements of contract law and burden of proof upon party claiming legal settlement contract.

(4) Consider well that Plaintiffs have never denied that they decided to "verbally submit" or "concede" or "agree to accept" $ 18,000 in exchange for cessation of litigation, during the unexpected events turn of events entirely under the control of the trial judge but that they later timely took clear exception to the conditions of surprise, isolation, extreme time constraint, and lack of any reasonable, conscientious alternative being allowed them.

Consider also that while Plaintiffs did even after May 13, 1993 offer to "stand by their word" and discuss lenient compromise in return for the $ 18,000, that offer was flatly refused and the defense counsel and trial judge continued to attempt to force the Plaintiffs to make various concessions never brought forth on May 13, 1993.

(5) Deliver a clear message as regards the requirements in Mississippi for legally binding agreements, by mandating a new trial.

(6) Include in a written opinion, designated for publication, wording which reinforces the fact that this Court expects truth in

documents and testimony, particularly by officers of the court, and will support the State Boards of Public Accountancy in its role.

(7) If this Court's final decision and mandate are for anything other than a new trial, make very clear exactly what this Court would have defendant and Plaintiffs do.

(8) Expedite the final decision as much as possible.

The Plaintiffs submit that the deciding elements in this case are simple. The vast complexities and expenses of money and court time brought about by the position the defendant took on March 2, 1984 (when h may have subjugated his better judgment to an attorney) need not now be further analyzed.

If the Plaintiffs have offended this Court, they offer a sincere apology, in expectation that this Court will without emotion make a decision which is in the best future interest of all Mississippi citizens. Plaintiffs would welcome the opportunity to testify before this Court to answer any questions the Court may have, with the defendant present or represented.

RESPECTFULLY SUBMITTED BY:

"s / LYNN WIRTZ", Pro se for Appellants
149 Dunbar Road
Natchez, Mississippi 39120
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CERTIFICATE OF SERVICE . . .

APPENDIX "C"

THE SUPREME COURT OF MISSISSIPPI
NO. 94-CA-00040-SCT

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ AND CLAY WIRTZ

v.

DENNIS R. SWITZER AND DENNIS R. SWITZER, CPA,LTD.

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-A

DATE OF JUDGMENT:	12/06/93
TRIAL JUDGE:	HON. RICHARD T. WATSON COURT
FROM WHICH APPEALED:	ADAMS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANTS:	LYNN WIRTZ, PRO SE
ATTORNEY FOR APPELLEES:	RICHARD D. GAMBLIN
NATURE OF THE CASE:	CIVIL - OTHER
DISPOSITION:	AFFIRMED - 11/6/97
MOTION FOR REHEARING DENIED:	12/22/97
MANDATE ISSUED:	12/31/97

BEFORE PRATHER, PJ., ROBERTS AND MILLS, JJ.
MILLS, JUSTICE, FOR THE COURT:

STATEMENT OF THE CASE

On June 18, 1985, Charlena Wirtz, as Executrix of the Estate of Lena Watson Whitley, and Charlena Wirtz, Lynn Wirtz, Elizabeth Wirtz, Andrew Wirtz, and Clay Wirtz, as residuary beneficiaries under the will of Lena Whitley, filed a Complaint in the Circuit Court of Adams County against Dennis Switzer and Dennis Switzer, CPA, Ltd. Wirtz alleged that

Switzer failed to exercise the degree of care, skill, and diligence required of certified public accountants while providing accounting services for the Estate.

The trial was conducted on November 4 and 5, 1987. At the close of Wirtz's case, Switzer moved for a directed verdict on certain issues, including punitive damages, and the motion was granted by the trial court. The trial court also granted Wirtz's Motion for Directed Verdict regarding the other claims of the suit. On February 18, 1988, Wirtz appealed the trial court's decision to grant Switzer's Motion for Directed Verdict. In 1991, this Court affirmed the trial court's decision as to the punitive damages but remanded the case for a new trial on the issue of alleged negligent preparation of an Estate schedule by Switzer. See *Wirtz v. Switzer*, 586 So.2d 775 (Miss. 1991).

On July 13, 1992, Wirtz filed a Motion for Partial Summary Judgment. The trial court never ruled on this motion as it was not set for hearing. Wirtz engaged and dismissed several attorneys following the Mandate from the Supreme Court which resulted in three continuances of the case. On March 15, 1993, Switzer filed a Motion to Dismiss. The next day, Wirtz retained the services of Guy N. Rogers, Jr. and Christopher G. Holt. On March 25, 1993, Wirtz responded to the Motion to Dismiss. On March 29, 1993, the trial court conducted a hearing in which the Motion was denied and the case was set for trial on May 13, 1993. At this hearing the trial judge warned Wirtz that the case would be dismissed if it was not tried on May 13, 1993 "for any reason attributable to the Plaintiffs."

After the hearing, Wirtz filed several motions, including two motions to amend the Complaint. The trial court denied all motions on May 6, 1993. After being informed of a new expert witness for the Plaintiffs, Switzer filed a Motion to Exclude Testimony on May 12, 1993. Both parties and their respective attorneys appeared before the Circuit Court of Adams County on the scheduled trial date of May 13, 1993. The trial judge, Richard T. Watson, and the attorneys for both parties participated in a settlement conference before the trial was scheduled to begin. Despite vehement protests, the trial judge did not allow Lynn and Charlena Wirtz to participate in the settlement conference. Switzer was also excluded from the conference, but made no objection. Following a brief discussion among the attorneys with confirmation from the respective clients, an agreement was reached in the amount of $18,000 for all claims arising from the alleged negligence of Switzer, and the trial judge dismissed the jury panel. The terms of the agreement were not put in writing at that time, and no contemporaneous record of the settlement was made.

Following the oral agreement, Switzer submitted a written settlement agreement and release to which Wirtz violently objected. The major problem with the wording revolved around the desire of Wirtz to seek disciplinary action against Switzer with the Mississippi and Louisiana State Boards of Accountancy. After months of unsuccessful negotiations, Switzer filed a Motion to Enforce the Settlement Agreement on August 19, 1993. After Wirtz responded on August 27, 1993, a hearing was conducted on August 30, 1993. Once again, Lynn Wirtz's request to testify was denied. After hearing oral arguments, the trial court took the motion under advisement.

On December 7, 1993, the trial court issued an opinion and order on the motion to enforce the settlement agreement. The trial court dismissed the action with prejudice, directed the Defendant to pay $18,000 into the registry of the Circuit Court of Adams County, and directed that the Plaintiffs may not institute, prosecute, or pursue any complaint or other proceeding against Switzer with the Mississippi State Board of Public Accountancy or with the Louisiana State Board of Public Accountancy. Wirtz promptly appealed.

Wirtz filed a Designation of the Record and a Statement of the Issues. In response, Switzer filed a Motion for Sanctions pursuant to Rule 10 of the Supreme Court Rules. The trial court conducted a hearing on February 14, 1994. Wirtz responded in writing but did not appear. The trial court failed to grant the requested sanctions, but many of the documents designated for the record by Wirtz were stricken, including the Statement of the Issues.

In March of 1994, Wirtz filed a Statement of the Evidence. Switzer objected to this statement, and the trial court conducted a hearing in April of 1994. Wirtz did not appear at the hearing but responded in writing. In addition to Switzer and his attorney, the trial judge asked Christopher Holt to appear at the hearing. At this time, Holt was no longer counsel for Wirtz who was now proceeding pro se. After hearing Switzer's objections to the Statement of the Evidence and questioning Holt about the accuracy of the Statement, the trial court entered an order on July 21, 1994, which significantly varied from the Statement presented by Wirtz.

STATEMENT OF THE ISSUES

I. **DID THE TRIAL COURT ERR BY ENFORCING THE ORAL SETTLEMENT AGREEMENT AND PREVENTING THE PLAINTIFFS FROM SEEKING**

DISCIPLINARY ACTIONS AGAINST SWITZER WITH THE MISSISSIPPI AND LOUISIANA STATE BOARDS OF PUBLIC ACCOUNTANCY?

II. **DID THE ACTIONS AND RULINGS OF THE CIRCUIT COURT JUDGE CONSTITUTE BIAS OR PREJUDICE AGAINST WIRTZ?**

III. **DID THE CIRCUIT COURT PROPERLY CONSIDER AND RULE ON SWITZER'S OBJECTIONS TO WIRTZ'S STATEMENT OF THE EVIDENCE?**

STATEMENT OF THE FACTS

Lena Watson Whitley died on November 28, 1981. In her Last Will and Testament, Whitley named Charlena Wirtz as Executrix. The Will also named Lynn Wirtz, Charlena Wirtz and their three children as residuary beneficiaries of the Estate. Forrest A. Johnson represented the Estate, and Dennis Switzer served as the Estate's accountant until April 1984. The administration of the Will was supervised by Chancellor Joseph Zuccaro in the Chancery Court of Adams County.

During the course of the administration of the Estate, a dispute arose between the Executrix (Mrs. Wirtz) and certain nieces and nephews of Whitley (hereinafter "heirs") who were represented by David C. Bramlette, III. This dispute concerned ownership of certain oil and gas-producing properties located in the State of Louisiana and entitlement to distribution of income derived from those properties. As a result of the dispute, the Executrix and the heirs entered into an Act of Compromise, Settlement, Conveyance, and Release. At the request of the Estate's attorney, Switzer prepared a schedule entitled "Net Oil Income Attributable to Beneficiaries, October 31, 1983" which was incorporated into the Act.

A few days later, the Estate's attorney told the Executrix that she needed to retain an additional $30,000 from the money to be distributed to the heirs because Switzer had called and said that the 1982 windfall profit taxes had not been included on the schedule. Switzer estimated the amount of the taxes would be $30,000. The Executrix withheld $30,000 from the amount of the settlement agreement when she distributed the funds to the heirs and included a note to the heirs' attorney explaining the reason for withholding the amount. The heirs demanded a disbursement of the remaining funds, and when the Executrix refused, they filed a Complaint in the Chancery Court of Adams County demanding payment of the

amount withheld. Following continued negotiation, an agreement was reached by all parties involved.

On June 18, 1985, the Estate filed suit against Dennis Switzer asserting claims of professional malpractice, including negligent preparation of the schedule of "Net Oil Income Attributable to Beneficiaries, October 31,1983." The case was tried on November 4 and 5, 1987. The Circuit Court directed a verdict for Switzer as to all claims arising from the preparation of the schedule of "Net Oil Income," and the Plaintiffs appealed to the Supreme Court. On September 4, 1991, this Court reversed and remanded for a new trial on the issue of Switzer's alleged negligence in the preparation of the schedule and affirmed as to all other issues. See *Wirtz v. Switzer*, 586 So.2d 775 (Miss. 1991). The Mandate was issued on November 5, 1991.

On July 13, 1992, Wirtz filed a Motion for Partial Summary Judgment. This motion was never addressed by the trial court because a hearing date was never set by the attorney representing Wirtz. After three continuances due to Wirtz's lack of trial counsel, Switzer filed a Motion to Dismiss on March 15, 1993. Following the initial trial in Chancery Court, Wirtz employed and subsequently discharged at least four different attorneys. After Switzer filed the Motion to Dismiss, Christopher Holt and Guy Rogers, Jr. appeared as counsel for Wirtz and responded to the motion. On March 29, 1993, the Circuit Court of Adams County conducted a hearing on the Motion to Dismiss and denied the motion. The trial judge was quite agitated with the state of the case especially the continued delay of trial due to Wirtz's lack of counsel. The case was set for trial on May 13, 1993, and the Court informed Wirtz that the case would be dismissed if it were not tried on May 13, 1993 for any reason attributable to the Plaintiffs.

Prior to the May 13, 1993 trial date, Wirtz filed two motions to amend the Complaint. These motions were heard by the Circuit Court and denied on May 6, 1993. On May 11, two days prior to trial, Switzer's attorney was advised by Wirtz's attorneys that a new expert witness, Cathy Reed, was expected to testify at trial on behalf of Wirtz. Switzer moved to exclude this witness's testimony. This motion was never addressed by the trial court because a settlement was reached prior to trial.

On May 13, 1993, the parties and their attorneys appeared before the Circuit Court of Adams County for trial. Prior to the commencement of the trial, Circuit Judge Richard T. Watson and the attorneys participated in a settlement conference. Lynn Wirtz and Charlena Wirtz asked the court for permission to participate in the settlement conference, but the trial judge denied the request.

After a brief discussion between the attorneys and approval by the respective clients, a settlement agreement was reached in the amount of $18,000 in settlement of all remaining claims. Judge Watson then dismissed the assembled jury panel. The terms of the settlement agreement were not put in writing at that time, and a record was not made.

Subsequently, Switzer's attorney prepared a proposed release and forwarded it to Wirtz's attorneys. Wirtz disagreed with the wording of the release, primarily because the language could be construed to preclude a complaint against Switzer before the Mississippi State Board of Public Accountancy and the Louisiana State Board of Public Accountancy. Efforts to resolve the differences in wording of the release were unsuccessful, and, on August 19, 1993, Switzer filed a Motion to Enforce the Settlement Agreement. Wirtz responded to the motion on August 27, 1993. Wirtz admitted that a settlement agreement was reached in the amount of $18,000 but denied the relinquishment of any rights to seek disciplinary action against Switzer from the Mississippi and Louisiana State Boards of Public Accountancy.

A hearing on the motion was conducted on August 30, 1993. Following a statement by Switzer's attorney, the trial judge questioned Christopher Holt regarding the problems with the settlement agreement. Holt told the court that the problem arose from a sense of duty on the part of the Wirtz family to file disciplinary actions with the Mississippi and Louisiana Boards of Accountancy to protect the public from further negligence by Switzer. Holt also admitted that this was the first time the court was made aware of this situation. However, this desire was stated earlier in the Plaintiffs' Motion for Partial Summary Judgment which was never set for hearing. Lynn Wirtz requested permission to testify at the hearing, but the trial judge denied the request, and no proffer of the testimony was made. Following the hearing, the trial judge took the motion under advisement.

On December 7, 1993, the Circuit Court rendered an Opinion and Order on Motion of Defendants to Enforce Settlement Agreement. In this Order, the trial judge upheld the existence of an agreement, directed the Defendants to pay $18,000 into the registry of the Circuit Court of Adams County and precluded the Plaintiffs from seeking any type of disciplinary action against Switzer.

On January 6, 1994, Wirtz filed an appeal to this Opinion and Order. Shortly thereafter, Wirtz filed a Designation of the Record and Statement of the Issues. In response, Switzer filed a Motion for Sanctions asserting that the designation was not in compliance with Rule 10 of the Supreme Court Rules. A hearing was held on February 14, 1994. Wirtz

responded in writing but did not attend. On June 20, 1994, the trial judge entered an Order on the Motion for Sanctions. The trial judge did not impose any sanctions on Wirtz, but the Statement of the Issues was stricken from the record in accordance with Supreme Court Rule 10(b)(4). On March 7, 1994, Wirtz filed a Statement of the Evidence. Switzer filed objections to the statement, pursuant to Rule 10(c) of the Supreme Court Rules. The trial judge conducted a hearing on the objections on April 18, 1994. Wirtz responded in writing but did not appear at the hearing. After hearing objections to the Statement of the Evidence by Switzer's attorney, Judge Watson questioned Christopher Holt as to the accuracy of Switzer's objections. At this time, Holt was no longer representing Wirtz and was asked by the trial judge to attend the hearing. Holt testified that he made himself available to Wirtz prior to the hearing, but Wirtz did not wish to include his testimony. Wirtz disputes this statement claiming that Holt refused to attend the hearing without the issuance of a subpoena. Holt agreed with the facts as presented by Switzer rather than those presented by Wirtz. The trial judge also offered his own recollections into the record at this hearing. Subsequently, the rulings of the trial judge were incorporated into the Order on Objections to Statement of the Evidence, which was entered on July 21, 1994.

ANALYSIS

Wirtz contends that the settlement agreement is not enforceable due to judicial interference by the trial judge, duress placed upon the Plaintiffs to accept the unfair agreement, the Plaintiffs being barred from the settlement conference, threats of sanctions and dismissal of the suit, and a conspiracy between the defense, the trial court and Wirtz's former counsel. However, the record is clear that Wirtz accepted the settlement offer of $18,000 and then rejected the agreement at a later date after being informed that the settlement could preclude any disciplinary action against Switzer with the Accounting Boards. Therefore, the only issues before the Court involve questions of bias surrounding the trial judge's rulings, proper enforcement of the settlement agreement and the trial court's ruling on the Statement of the Evidence.

I. DID THE TRIAL COURT ERR BY ENFORCING THE ORAL SETTLEMENT AGREEMENT AND PREVENTING THE PLAINTIFFS FROM SEEKING DISCIPLINARY ACTIONS AGAINST SWITZER WITH

THE MISSISSIPPI AND LOUISIANA STATE BOARDS OF PUBLIC ACCOUNTANCY?

On May 13, 1993, the trial judge and the attorneys for both parties conducted a settlement conference prior to the scheduled trial. Neither party was allowed to participate in the conference. The attorneys agreed on a settlement in the amount of $18,000. After the attorneys conferred with their clients an oral agreement was reached, and the jury panel was dismissed. Subsequently, the parties were unable to agree on the wording of the settlement agreement, and a dispute arose. Wirtz now claims that no agreement exists.

A. STANDARD OF REVIEW

The standard of review for examining the findings of fact of a trial judge is well settled. The findings of fact of a trial court judge will not be disturbed by this Court unless there is reasonable certainty that the findings were manifestly wrong and against the overwhelming weight of the evidence. ***Richardson v. Riley***, 355 So.2d 667, 668 (Miss. 1978); See also, ***Travis v. Hartford Accident and Indemnity Co.***, 630 So.2d 337 (Miss. 1993); ***Collins by Smith v. McMurry***, 539 So.2d 127 (Miss.1989).

B. DID THE PARTIES REACH AN AGREEMENT

Wirtz makes several arguments on this point. However, the record, in Wirtz's Response to Motion to Enforce Settlement, is clear that the parties reached an agreement to settle on May 13, 1993. Despite the appearance of a settlement, Wirtz's arguments will be briefly discussed.

1. Duress

Wirtz claims that the settlement agreement is not valid due to duress placed on the Plaintiffs by the trial court. Wirtz contends that the trial court was so unfair in its rulings and posture towards the Plaintiffs as to force them to accept an agreement that was patently unfair and unacceptable to the average person. Wirtz also claims that during the settlement conference the trial judge clearly indicated to their attorneys that a directed verdict was inevitable unless the case was settled.

However, none of these allegations are supported by the voluminous record. While it is clear that the trial judge was quite agitated with Wirtz from the start due to constant delays in setting the case for trial,

there are no examples of threats to dismiss the case. In fact, Wirtz's claims are directly contradicted by the statements of Christopher Holt and Judge Watson at the hearing on the Statement of the Evidence. These statements give rise to Wirtz's claim of a conspiracy but are the only recorded statements available to the Court.

Switzer contends that Wirtz's claims of duress are misplaced and reflect a fundamental misunderstanding of the concept. This Court agrees. As suggested by Switzer, Wirtz had some serious expert witness problems shortly before trial. An expert is required to prove malpractice on the part of an accountant, and Wirtz had one expert who was most likely unavailable (literally but not legally) and another who was noticed to the defense only two days prior to trial. The trial judge initially excluded the testimony of the most recent expert but later changed his mind, allowing Switzer to choose between the two experts. This choice was never made due to the settlement.

There appears to be no merit in Wirtz's claim of duress. It is possible that the Plaintiffs were intimidated by the gruff and intolerant nature of the trial judge, but there is no evidence of duress or threats created by the trial judge.

2. Lack of Contemporaneous Writing

Wirtz argues that the lack of a writing to support the claims of a settlement agreement makes the agreement void because of the potential for fraud, mistake, and disputes. However, this Court has consistently recognized the validity of oral settlement agreements. See ***Travis v. Hartford Accident and Indemnity Co.***, 630 So.2d 337 (Miss. 1993); ***Collins v. Dixie Transport, Inc.***, 543 So.2d 160 (Miss. 1989).

3. Attorneys had no Authorization to Settle

Wirtz claims that their attorneys did not have the authority to enter this agreement. As stated by Switzer:

> [I]t is presumed that an attorney who has represented a party is authorized to take all action necessary to conduct the litigation. The burden of showing that the attorney had no authority to act is upon the party denying such authority. See ***Terrain Enterprises, Inc. v. Western Cas. and Surety Co.***, 774 F.2d 1320, 1322 (5th Cir. 1985), citing ***Great Atlantic & Pacific Tea Co. v. Majure***, 176 Miss. 356,

168 So. 468, 472 (1936) an ***Hirsch Bros. & Co. v. R. E. Kennington Co.***, 155 Miss. 242, 124 So. 344, 347-48 (1929).

The record indicates that the attorneys for Wirtz did have the authority to make the agreement. Wirtz failed to prove that they did not.

Despite all of the contentions presented by Wirtz, it is undeniable that Wirtz admitted to the existence of a settlement agreement in the amount of $18,000. Therefore, the trial court acted properly in treating the settlement agreement as valid.

C. DOES THE AGREEMENT BAR THE INSTITUTION OF DISCIPLINARY ACTION AGAINST SWITZER WITH THE MISSISSIPPI AND LOUISIANA STATE BOARDS OF ACCOUNTANCY

Wirtz argues that, even if an agreement exists, no agreement was made regarding the desire of the Plaintiffs to seek disciplinary action against Switzer with the Mississippi and Louisiana State Boards of Accountancy. Therefore, preventing the Plaintiffs from instituting such action would constitute the addition of a material term to the agreement to which they do not agree. Furthermore, it is in the best interest of the public at large to discipline negligent accountants to prevent further losses by innocent parties.

Switzer argues that Wirtz's attorneys did not reserve or except any terms or conditions from the settlement agreement and that the agreement was made in full accord and satisfaction of all claims arising from the allegedly negligent accounting services. The trial court agreed. In addition, Switzer cites applicable law supporting the enforcement of settlement agreements:

> The settled law in Mississippi is that "[s]ettlement agreements are highly favored in the law and will be upheld,whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits." ***D. H. Overmyer Co. v. Loflin***, 440 F.2d 1213, 1215 (5thCir. 1971). Mississippi "law favors the settlement of disputes by agreement of the parties and, ordinarily, will enforce the agreement which the parties have made, absent any fraud, mistake, or overreaching." ***McManus v. Howard***, 569 So.2d 1213, 1215 (Miss. 1990).

Following a hearing on the Motion to Enforce Settlement, the trial court determined that this issue was not reserved by the Plaintiffs at any

time, Switzer entered the settlement agreement with the anticipation of ending all litigation, and the trial court was not informed of this desire of the Plaintiffs until August 30, 1993.[1] The record supports the findings of the trial court.

Although this Court has never addressed this specific issue, Switzer offers the similar case of ***Downey v. Clauder***, 811 F. Supp. 338 (S.D. Ohio 1992). In ***Downey***, the Court assisted the parties in reaching a settlement agreement in a legal malpractice action. However, Downey had previously instituted disciplinary action against Clauder with the Cincinnati Bar Association, and that action was still pending at the time of the settlement. After Clauder refused to sign the agreement, Downey withdrew the complaint, but there was another pending complaint still before the Cincinnati Bar.

The district court looked to the intent of the parties and the circumstances surrounding the agreement. The court determined that Clauder settled to avoid disciplinary proceedings and gave this principle purpose the greatest weight. The court concluded that without the settlement of all remaining claims the agreement had little value to Clauder. Id. at 339-40. The court also noted that, if the second complaint was of importance to Downey, it should have been excepted from the agreement. Id. at 340.

Switzer analogizes Downey with the case sub judice. Because a settlement of the claim would have little value to Switzer if Wirtz was able to seek disciplinary action, Switzer contends that the intent of the parties was to resolve all claims. Once again, Switzer points to the fact that the term was not specifically reserved or excepted from the agreement.

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[1] The record indicates that Wirtz did express a desire to seek disciplinary action prior to August 30. The statement was made in the Motion for Partial Summary Judgment. However, this motion was never addressed by the trial court because it was never set for hearing.

Ironically, this works in Switzer's favor. Since Wirtz previously expressed a desire to seek disciplinary action, the fact that this issue was not reserved or excepted from the settlement agreement supports the proposition that the settlement was made in full accord and satisfaction of all claims arising from the alleged negligence.

In conclusion, it appears that the trial court acted properly in enforcing the agreement as to all claims. Since the right to seek disciplinary action was never excepted from the agreement, the agreement should prevent such future action by the Plaintiffs. It seems clear that the decision of the trial court was not manifest error. Therefore, his decision should stand.

D. EVIDENTIARY HEARING

Wirtz also argues that the trial court erred by not conducting an evidentiary hearing on the settlement agreement dispute. However, the trial court did conduct a hearing on the dispute. Wirtz contends that this hearing was insufficient as Lynn and Charlena Wirtz were not allowed to testify. This fact is undisputed, but no proffer of their testimony was made to the trial court.

If a proffer had been made, it is conceivable that the trial judge should have recused himself from an evidentiary hearing on the matter considering the nature of the charges by Wirtz of judicial interference and misconduct and the fact that the judge was a witness and a participant in the alleged improprieties. Although not cited by Wirtz, this Court has held that a judge must recuse himself in a similar situation. In ***Collins v. Dixie Transport, Inc.***, 543 So.2d 160 (Miss. 1989), the trial court held an evidentiary hearing to determine if an oral settlement agreement was actually made. Throughout the hearing, witnesses for the Plaintiff testified that the trial judge was a witness to the agreement and that the judge had urged them to accept the settlement offer. Following each remark, the trial judge commented on his actions to the Plaintiff's detriment. This Court remanded the case for a new evidentiary hearing finding that the judge assumed the role of both witness and finder of fact. ***Collins***, 543 So.2d at 167.

Since Wirtz made no proffer of testimony, the finding in ***Collins*** is not readily applicable to the present case at the hearing on the Motion to Enforce Settlement Agreement. However, at the hearing on the Statement of the Evidence, the trial judge consistently offered his own testimony into the record concerning the objections of Wirtz. Wirtz was not at the hearing to object to the statements of the trial judge and was not represented by counsel. Since the statements were not directly addressed by Wirtz, no testimony was proffered, and no recusal was sought at the time of the hearing, this issue is also without merit.

In summary, Wirtz makes many arguments as to the existence of a settlement agreement. None have merit. It is clearly indicated in the record

that an agreement did exist as of May 13, 1993. No argument presented by Wirtz is persuasive enough to overcome the manifest error standard afforded to the trial judge. It is also clear that an agreement allowing Wirtz to seek disciplinary action would have little value to Switzer. The fact that the key terms were not excepted from the agreement supports the trial judge's finding of a full and binding agreement. Therefore, the decision of the trial court is affirmed as to this issue.

II. DID THE ACTIONS AND RULINGS OF THE CIRCUIT COURT JUDGE CONSTITUTE BIAS OR PREJUDICE AGAINST WIRTZ?

Wirtz alleges that the trial judge acted improperly, prejudicially, and with bias by consistently making rulings favorable to Switzer while ignoring Wirtz's arguments. However, this claim is totally unsupported by the record. The crux of Wirtz's argument involves alleged threats of sanctions, threats of a dismissal or directed verdict, and improper affiliation of the trial judge with the defense counsel and a defense witness.

Taken in context, the threat of dismissal by the trial judge was understandable and proper. At the hearing on Switzer's Motion to Dismiss, the trial judge admonished Wirtz for constantly delaying the trial of this case. Prior to the hearing, Wirtz had asked for, and received, three continuances due to the lack of trial counsel. At the hearing, the trial judge was understandably upset that this case was still on the docket considering the heavy case load of the Circuit Court of Adams County. He informed Wirtz that the case would be dismissed if a trial was not conducted on May 13, 1993 for any reason attributable to the Plaintiff. Wirtz took this statement as a threat, possibly indicating the trial judge's bias against them. However, this interpretation is not supported by the record as there is no evidence of intent to intimidate on the part of the trial judge. The statement was clearly made to expedite the matter at hand.

Wirtz also argues that the trial judge threatened to grant a Motion for Directed Verdict in favor of Switzer during the settlement negotiations on May 13, 1993. However, neither Lynn nor Charlena Wirtz participated in the negotiations. This claim is based on alleged statements attributable to their attorney, Christopher Holt. However, this claim is directly contradicted by the statements of Holt, the trial judge and Switzer's attorney at the hearing on the Statement of the Evidence. Throughout the voluminous record in this case, there is no evidence of this claim other than the statements of the Plaintiffs.

At the hearing on the Motion to Enforce Settlement Agreement, the trial judge threatened to sanction Wirtz following her refusal to accept the settlement agreement. The trial judge was obviously angry over the breakdown in settlement negotiations. He assessed Wirtz the costs of impaneling the jury on May 13, 1993, finding her opposition to the settlement agreement to be without merit and frivolous but no sanctions were imposed. Subsequently, Switzer sought sanctions against the Wirtz for filing inappropriate documents in the Designation of the Record and for the incendiary nature of Wirtz's Statement of the Issues. However, the trial judge imposed no sanctions at this time, giving Wirtz the benefit of the doubt since she was now acting pro se.

At no time did the trial court impose sanctions on Wirtz. Despite the contentions of Wirtz, no duress to accept the agreement could arise from the consideration of sanctions because all occurred following the settlement agreement. The trial judge acted properly at all times and only imposed the fee for the jury cost after finding Wirtz's objection to the settlement to be frivolous.

Wirtz also argues that the trial judge erred by striking designated documents from the Designation of the Record. The judge did allow Wirtz to designate the entire record but found many documents to be duplicative and in violation of Rule 10 of the Supreme Court Rules. No improper behavior can be found as to this assertion. It appears that the trial judge strictly followed the requirements of Rule 10.

Finally, Wirtz contends that the trial judge showed bias and intimidated the Plaintiffs by speaking of his long-term friendship with a partner in the defense counsel's firm and with a defense witness. At the hearing on the Motion to Dismiss, the defense expressed concern over deposing a witness, Federal Judge David Bramlette, who had represented the heirs in their suit against Wirtz. The trial judge stated that Bramlette was a lifelong acquaintance, and there should be no problem in taking his deposition. At the hearing, the trial judge also inquired about the health of William O. Carter, Jr., a senior partner of the defense counsel's firm of Wise Carter Child & Caraway, P. A. The trial judge and Carter attended law school together but have had no business dealings since. The trial judge stated as much at the hearing on the Statement of the Evidence. Wirtz makes no showing of improper behavior on the part of the trial judge. The fact that the judge knows prominent members of the legal community has little bearing on his ability to fairly administrate a case.

This issue is without merit. The record does not support a finding that the trial judge acted improperly or prejudicially. Although the judge was firm and, at times, gruff, this Court has held that "an occasional

display of irritation, usually regretted as soon as made, does not suffice to show personal bias or prejudice, whether the irritation was justified or not." ***Middleton v. Evers***, 515 So.2d 940, 942 (Miss. 1987). A judge must recuse himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." ***Collins v. Joshi***, 611 So.2d 898, 901 (Miss. 1992); ***Rutland v. Pridgen***, 493 So.2d 952, 954 (Miss. 1986); Mississippi Code of Judicial Conduct, Canon 3C(1). Wirtz does not meet this standard. Therefore, it is recommended that this issue be affirmed.

III. DID THE CIRCUIT COURT PROPERLY CONSIDER AND RULE ON SWITZER'S OBJECTIONS TO WIRTZ'S STATEMENT OF THE EVIDENCE?

The Statement of the Evidence should convey a fair, accurate, and complete account of what transpired with respect to those issues that are the basis for appeal. Rule 10(c) of the Supreme Court Rules. If a disagreement exists between parties as to the content of the statement, the trial court shall settle the differences, and the record shall be made to conform to the truth. Rule 10(e) of the Supreme Court Rules.

Wirtz argues that the hearing on the Statement of the Evidence was a "sham," and the present Statement of the Evidence does not conform to the truth. Wirtz was not present at the hearing which was held on April 18,1994.

The Circuit Judge directed Christopher Holt, Wirtz's former attorney, to appear at the hearing. After Switzer's counsel made objections to the Statement of the Evidence as presented by Wirtz, the trial court asked Holt if Switzer's rendition of the events was correct. Holt answered in the affirmative. Wirtz uses terms such as "betrayal" and "conspiracy" to describe the preceding event, but there is no hint of impropriety in the record. Wirtz was given the opportunity to attend the hearing but chose not to.

The trial judge, the defense and Christopher Holt agree that the Statement of the Evidence conforms to the truth in compliance with Rule 10. Wirtz claims that it does not. The record provides no basis for doubting the statements of the former. Clearly, there is no proof of manifest error on the part of the trial judge. Therefore, the decision of the trial judge is affirmed as to this issue.

CONCLUSION

After reviewing the voluminous record in this case, very few facts are uncontested. It is clear that Wirtz felt prejudiced by the trial proceedings. It is not clear that these feelings were justified. From the record, it is obvious that Wirtz believes that they were wronged and should be compensated. They also believe that Switzer should be responsible for his actions. It is their perception of this accountability that has hindered the settlement process.

Despite good intentions and zeal, Wirtz has displayed little or no understanding of the legal system. Their arguments do not meet the necessary standards for reversal, and the issues presented have little merit. Although it may be in the public's best interest to allow Wirtz to seek disciplinary action against Switzer, it was not part of the settlement agreement. Therefore, Wirtz should be precluded from seeking such action.

AFFIRMED.

PRATHER AND SULLIVAN, P.JJ., PITTMAN, BANKS, ROBERTS AND SMITH, JJ., CONCUR. LEE, C.J., AND McRAE, J., CONCUR IN RESULT ONLY

APPENDIX "D"

FILED APR 26 1996
LINDA STONE
SUPREME COURT CLERK

IN THE SUPREME COURT OF MISSISSIPPI
NO. 94-CA-00040

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ Appellants

v.

DENNIS R. SWITZER, DENNIS R. SWITZER, CPA, LTD. Appellees

ORDER

This matter comes before this Court on Motion of Appellants to Reconsider Order on Motion of Appellee to Strike "Appellants' Principal Brief". The Appellants request that this Court reconsider its order entered on April 1, 1996, which directed that the Appellants' brief be stricken for failure to comply with M.R.A.P. 32(a).

"Petitions for rehearing are limited to cases on the merits." M.R.A.P. 40 cmt. This Court finds that the motion is not well taken and should be denied.

IT IS THEREFORE ORDERED that the Motion of Appellants to Reconsider Order on Motion of Appellee to Strike "Appellants' Principal Brief" be, and hereby is, denied.

SO ORDERED, this, the 23rd day of April, 1996.

"s / James L. Roberts, Jr."
FOR THE COURT

APPENDIX "E"

FILED APR 1 1996
LINDA STONE
SUPREME COURT CLERK

IN THE SUPREME COURT OF MISSISSIPPI
NO. 94-CA-00040

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ Appellants

v.

DENNIS R. SWITZER, DENNIS R. SWITZER, CPA, LTD. Appellees

ORDER

This matter comes before the Court on the Motion of Appellees to Strike "Appellants' Principal Brief". The Appellees request that this Court strike the Appellants' brief pursuant to M.R.A.P. 28(k) and 32(a). The Appellees contend that the Appellants' brief is "replete" with language showing disrespect for the trial court and the print is too small. The Appellants have filed a response in opposition to the Appellee's motion.

Upon consideration, the Court finds that the Appellees' motion should be granted. The type for typewritten briefs shall not be smaller than pica. M.R.A.P. 32(a). Pica is defined as "a size of typewriter type with 10 characters to the linear inch and six lines to the vertical inch". Webster's Third New International Dictionary 1709 (1986). The print used in the Appellants' brief is smaller than pica.

IT IS THEREFORE ORDERED that the Motion of Appellees to Strike "Appellants' Principal Brief" be, and hereby is, granted. The Appellants have fourteen days from the entry of this order to file a brief complying with M.R.A.P. 32(a). The Appellants are further instructed in redrafting their brief to be mindful of M.R.A.P. 28(k

SO ORDERED, this, the 28th day of March, 1996.

"s / James L. Roberts, Jr."
FOR THE COURT

APPENDIX "F"

FILED DEC 13 1995
LINDA STONE
SUPREME COURT CLERK

IN THE SUPREME COURT OF MISSISSIPPI
NO. 94-CA-00040

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ Appellants

v.

DENNIS R. SWITZER, DENNIS R. SWITZER, CPA, LTD. Appellees

ORDER

This matter came before the Court on the Motion of Plaintiffs/Appellants for Permission to File Extended Brief. The Appellants request permission to file a brief in excess of the fifty page limit set by M.R.A.P. 28(g). After consideration, the Court finds that the motion should be denied.

IT IS THEREFORE ORDERED that the Motion of Plaintiffs/Appellants for Permission to File Extended Principal Brief be, and hereby is, denied.

SO ORDERED, this, the 8th day of December, 1995.

"s / _____"
FOR THE COURT

APPENDIX "G"

FILED AUG 6 1995
LINDA STONE
SUPREME COURT CLERK

IN THE SUPREME COURT OF MISSISSIPPI
NO. 94-CA-00040

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ Appellants

v.

DENNIS R. SWITZER, DENNIS R. SWITZER, CPA, LTD. Appellees

ORDER

This matter came before a panel of this Court consisting of Chief Justice Hawkins, Justice Sullivan, and Justice Pittman on the Motion of Plaintiffs/Appellants to Reconsider Orders. Finding that the motion is not well taken, this Court is of the opinion that the motion should be denied.

IT IS THEREFORE ORDERED that the Motion of Plaintiffs/Appellants to Reconsider Orders be, and hereby is, denied.

SO ORDERED, this, the 11th day of August, 1995.

"s / Michael Sullivan"
FOR THE COURT

APPENDIX "H"

STATE OF MISSISSIPPI
SUPREME COURT

MANDATE FROM THE SUPREME COURT OF MISSISSIPPI

To the Adams County Circuit Court - GREETINGS:

On 22nd Day of June, 1995, in proceedings held in the Courtroom, Carroll Gartin Justice Building, the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case # 94-CA-00040-SCT
Trial Court Case # 5701

Charlena Wirtz, as Executrix of the Estate of Lena Watson Whitley, Charlena Wirtz, Lynn Wirtz, Elizabeth Wirtz, Andrew Wirtz and Clay Wirtz
vs.
Dennis R. Switzer and Dennis R. Switzer, CPA, Ltd.

Appeal No. 94-TS-00728 and Appeal No. 94-TS-00857 are dismissed upon entry of this Order. All costs of these appeals are taxed against the Appellants. Order entered.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

WITNESS, the Hon. Armis E. Hawkins, Chief Justice of the Supreme Court of Mississippi; also the signature of the Clerk and the Seal of said Court hereunto affixed, in the City of Jackson, on July 13, 1995, A.D.

"s / Linda Stone"
Supreme Court Clerk

APPENDIX "I"

FILED JUN 22 1995
LINDA STONE
SUPREME COURT CLERK

IN THE SUPREME COURT OF MISSISSIPPI
NOs. 94-CA-00040, 94-TS-00728, and 94-TS-00857

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ Appellants

v.

DENNIS R. SWITZER, DENNIS R. SWITZER, CPA, LTD. Appellees

ORDER

This matter came before a panel of this Court consisting of Presiding Justice Prather, Justice Banks, and Justice Smith on the Motion of Plaintiffs/Appellants to Supplement the Record. After thorough review, this Court finds that the motion should be denied with the exception of item number eight which is the transcript of the hearing on the "Objections to Statement of the Evidence" held on April 18, 1994.

IT IS THEREFORE ORDERED that the Motion of Plaintiffs/Appellants to Supplement the Record be, and hereby is, denied with the exception of item number eight. The lower court clerk is hereby directed to provide this Court with a supplemental volume containing the transcript of the hearing of the "Objections to Statement of the Evidence" held on April 18, 1994, within thirty (30) days from the entry of this Order. All costs of supplementation are taxed against the Appellants.

SO ORDERED, this, the 13th day of June, 1995.

"s / Lenore L. Prather"
FOR THE COURT

APPENDIX "J"

FILED JUN 22 1995
LINDA STONE
SUPREME COURT CLERK

IN THE SUPREME COURT OF MISSISSIPPI
NOs. 94-CA-00040, 94-TS-00728, and 94-TS-00857

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ Appellants

v.

DENNIS R. SWITZER, DENNIS R. SWITZER, CPA, LTD. Appellees

ORDER

This matter came before a panel of this Court consisting of Presiding Justice Prather, Justice Banks, and Justice Smith on the Court's own motion. After thorough review of the record, this Court feels compelled to address the Written Statement of Proposed Corrections to Trial Court Record filed by the Appellants and the Statement of Appellees Regarding Proposed Corrections to the Record. This Court finds that the Appellant's suggested corrections are not warranted and should not be made. This Court further finds that the Appellee's suggestions should be made.

IT IS THEREFORE ORDERED that the Clerk of this Court strike pages 601-617, 647-48, 649-54, 655-61, 667-71, and 672-734 of the clerk's papers in Appeal No. 94-CA-00040 upon entry of this Order.

SO ORDERED, this, the 13th day of June, 1995.

"s / Lenore L. Prather"
FOR THE COURT

APPENDIX "K"

FILED JUN 22 1995
LINDA STONE
SUPREME COURT CLERK

IN THE SUPREME COURT OF MISSISSIPPI
NOs. 94-CA-00040, 94-TS-00728, and 94-TS-00857

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ Appellants

v.

DENNIS R. SWITZER, DENNIS R. SWITZER, CPA, LTD. Appellees

ORDER

This matter came before a panel of this Court consisting of Presiding Justice Prather, Justice Banks, and Justice Smith on the Motion of Plaintiffs/Appellants to Consolidate Appeals and Compel Transmission of Record. The Appellants request that the above referenced appeals be consolidated for consideration on the merits and that this Court direct the lower court clerk to transmit the record as designated. In response, the Appellees have requested a Rule 33 pre-hearing conference.

After thorough review, this Court finds that 94-TS-OO728 and 94-TS-00857 simply involve the content of the record in 94-CA-00040. This Court has provided procedures to establish the content of the appellate record in Rule 10 of the Mississippi Rules of Appellate Procedure. This Court is of the opinion that the appeals filed in 94-TS-00728 and 94-TS-00587 are improper and should be dismissed. The motion to consolidate is therefore moot.

This Court further finds that the motion to compel transmission of the record and the request for a Rule 33 pre-hearing conference should both be denied.

IT IS THEREFORE ORDERED that Appeal No. 94-TS-00728 and 94-TS-00857 be dismissed upon the entry of this Order. All costs of those appeals are taxed against the Appellants. The motion to consolidate

is hereby dismissed as moot and the motion to compel transmission of the record is hereby denied.

IT IS FURTHER ORDERED that the request for a Rule 33 pre-hearing conference be, and hereby is, denied.

SO ORDERED, this, the 13th day of June, 1995.

"s / Lenore L. Prather"
FOR THE COURT

APPENDIX "L"

State of Mississippi
County of Adams

re: Civil case no. 5701, Sixth Circuit
Supreme Court nos. 07-CA-59508
94-TS-00040
94-TS-00728
94-TS-00857
Charlena Wirtz et al v. Dennis Switzer et al
(issue as to whether case is settled)

AFFIDAVIT

Personally came before me, the undersigned notary public in and for the jurisdiction aforesaid, the within named Lynn Wirtz and Charlena Wirtz who after being duly sworn and placed under oath do say and make affidavit to the following:

We the undersigned, and our children, Elizabeth, Andrew and Clay are plaintiffs and appellants in a lawsuit filed June 17, 1985 alleging damages proximately resulting from malpractice by defendant Dennis R. Switzer (CPA) of Natchez, Mississippi, who during 1981-1984 served as accountant for an estate whose executrix is the undersigned Charlena Wirtz.

On December 14, 1992 we hired attorney Mr. Christopher G. Holt of Jackson, Mississippi for the purpose of preparation and representation of us at a new trial which the Mississippi Supreme Court had granted us by mandate of November 4, 1991.

Mr. Holt was thoroughly apprised of the fact that unless Mr. Switzer made some reasonable compensation for damages caused by a lawsuit against the estate and which had resulted in large financial losses and irreparable reputational damage to our family, we would exercise our right and fulfill our duty to file complaints, present evidence, and request an investigation of Mr. Switzer's accounting performance and professional conduct by the State Boards of Public Accountancy in Mississippi and Louisiana wherein he is licensed to practice public accountancy.

Mr. Holt was thoroughly informed that if the defendant continued to drain our finances and our energies by his denial of responsibility for the lawsuit against the estate after having rejected the tender of defense (March 2, 1984), we would consider it a binding civic duty to ask the State Boards to investigate.

Mr. Holt in fact agreed to assist us at reviews by these boards, if so requested. Early in his tenure Mr. Holt was made aware that several clear references to our intent to exercise our right to call for investigation and appropriate action by the licensing agencies, had been written into court

documents with which he had been copied and which he had been paid to read.

It is not our purpose here to attack Mr. Holt, but to faithfully transcribe the events of May 13, 1993 and their aftermath in full context as relates to the primary issue in this case of whether a meeting of minds and legal agreement (in lieu of trial) was, or even could have been reached between us and the defendant under the circumstances existing on May 13, as claimed by defense counsel and Court.

Mr. Holt's tenure ran from mid-December, 1992 until September 30, 1993 when he withdrew. The circumstances of hat withdrawal are very much related to the occurrences of May 13, but will not be covered here.

Early in Mr. Holt's tenure, he requested and received permission to enlist the services of an associate, attorney Guy N. Rogers. Messrs. Holt and Rogers were attorneys of record for plaintiffs and were present with us for a scheduled trial at the Adams County courthouse on the morning of May 13, 1993.

The events of that morning as we know them to be are as follows:

We arrived for the trial shortly after 8:00 a.m. and waited in a corridor adjoining the Circuit Courtroom while the attorneys conferred with Judge Richard T. Watson in chambers. Within about 10-15 minutes Messrs. Holt and Rogers emerged and escorted us into a private room, asked us to remain there, closed the door and left. An estimated twenty minutes later they returned. Their demeanor was instantly alarming to us. They proceeded to tell us that "the Judge said to tell you that this is only an eighteen thousand dollar case and that's all you're going to get, and our advice is for you to take it".

We were shocked at this sudden turn of events and we demanded to know what had gone wrong and exactly what the Judge had said, particularly as regards his stated reasons for his position. We made it very clear that we considered this an outrage and that we were owed an explanation of what had occurred in chambers. We reminded Messrs. Holt and Rogers that we had already been damaged several times that amount stipulated by the Judge. We made it very clear that we would not simply waive our right to trial and possible justice and equity after these nine years in return for a Court-stipulated fraction of our losses.

At this, Mr. Rogers said "well, Gamblin (defense counsel) is saying he wasn't timely noticed about our expert witness and so he Judge told him he can choose between Galloway's testimony (from trial transcript, plaintiffs expert CPA Wayne C. Galloway) or Cathy Reed's testimony (expert CPA hired for trial), and if he chooses her testimony he

will be granted a directed verdict because her testimony won't be sufficient".

At this point we believed that the Court was improperly prejudging the worth of our expert witness testimony and that were being subjected to duress and we made it very clear that we believed so. We took exception to what we felt to be an improper, coercive imposition. We took pains to be sure that we understood what we were being told and that there was no confusion on our part as to the source of the directive or ultimatum we were being given without any reasonable alternative. We made certain that there was no misunderstanding as to the fact that Messrs. Holt and Rogers were conveying to us what they purported to be the decisions and messages from the trial judge. At this point we had essentially no interest in Mr. Holt's or Mr. Roger's opinions which took the form of vehement urgings to submit; we wanted to know what the Judge had said.

At some point towards the end of these exchanges Mr. Holt emphatically stated that "the Supreme Court will affirm this directed verdict". We entirely discounted this prediction, but the threat of a directed verdict from the Court could not be ignored.

At this point we began to feel that we had no reasonable choice except to submit, rather than spend many more thousands of dollars and perhaps several more years in the appeal of another improper directed verdict, and another trial if granted by the Supreme Court. The time lapse between the prior directed verdict and he Supreme Court's mandate for a new trial had for a variety of reasons been four years to the day (November 4, 1987 - November 4, 1991), and we still did not have a new trial some one and one-half years after the mandate.

When we again expressed our feeling that what we were being told were the Court's position and directives seemed unbelievably improper, Mr. Holt asked if we wanted to "see the Judge" for ourselves. He said he would request permission. We readily accepted Mr. Holt's offer. He left the room and returned with the statement "the Judge won't talk to you, he doesn't see any point". We believe it must have been well past nine o'clock by this time.

The threat of a second directed verdict, however improper, was also formidable because we would not be able to institute complaints to the State Boards of Public Accountancy while the litigation continued, thus allowing the defendant to escape investigation for perhaps another two or three years at least.

We asked Messrs. Holt and Rogers if the defense counsel or the Judge had brought up the subject of our right to file complaints against Mr. Switzer with the State Boards of Public Accountancy. They replied

that they had not. We made very sure that neither Mr. Gamblin nor the Court had so much as mentioned the State Boards, and that waiver of our rights in that respect was not being sought. Messrs. Holt and Rogers assured us that those rights were not in jeopardy if we submitted to the Court's stated desires.

Finally, we told Messrs. Holt and Rogers that we would submit to the will of the Court and cease litigation against Mr. Switzer in exchange for the Court-stipulated $ 18,000. They left the room and returned shortly. Mr. Holt then blandly told us that the amount "might turn out to be $ 5,000 rather than the $ 18,000 because Gamblin said that may be all that he can get". We remained silent. Later, we were told by Holt or Rogers that the amount would be $ 18,000. At no time had we instructed our attorneys to negotiate for any settlement nor had we been personally involved in any such negotiation.

We asked who would be drafting the settlement agreement and were told that it would be Gamblin. Lynn Wirtz commented that very likely, it would include matters beyond what had been discussed, and that we would not be able to sign it.

Some two weeks later when Mr. Gamblin's draft was received, it was entirely unacceptable to us because it clearly would deprive us of our right to contact the State Boards of Public Accountancy and submit evidence to them. Also unacceptable was wording which if ratified by us would absolve Mr. Switzer of any blame or responsibility for negligence, damages, or the mental anguish we have endured for nearly ten years. Worse than this, the record would then falsely indicate that the lawsuit of February 1984 against the executrix Charlena Wirtz and the ensuing damages to the estate of Lena Watson Whitley had resulted from some fault or wrongdoing by the executrix rather than the negligence and errors of her accountant. Finally, such wording would therefore clearly indicate that we had filed a frivolous or unfair lawsuit against Mr. Switzer. We had no indication on May 13 that the settlement agreement would contain any of this.

The truth as irrefutably shown by the record on file is that in 1984-1985 we diligently tried to avoid having to file suit against Mr. Switzer and were originally willing to absorb half the cost of his errors, and the merits of our case have been thus far firmly upheld by the Supreme Court.

Messrs. Holt and Rogers had told us on May 13, 1993 that our rights to present evidence to the State Boards of Public Accountancy were not in jeopardy if we accepted the $ 18,000, and now they told us that our right to proceed with the State Boards would not be infringed if we signed

Mr. Gamblin's draft, but we knew better than this and in fact verified with the Mississippi Board that they could not proceed with a complaint investigation if we signed such a document. Even after being informed of this fact, Messrs. Holt and Rogers diligently tried to persuade us to sign the defense counsel's document verbatim, thereby exhibiting a total disregard for our rights, and our duty to assist the State Boards in maintaining standards for the accounting profession, one of the main things we had hired them to help us protect, and had discussed with them many times.

At one point we decided that despite the tactics which had been employed against us on May 13, 1993, and the defense counsel' adding of conditions never discussed or even mentioned, that we would not challenge the duress or other improprieties and would abide by what we had conceded to on May 13 if the defense counsel would remove the added conditions.

This he refused to do. After consulting with the Mississippi State Board to be sure its members would have no problem with our accepting more reasonable compensation for our losses in exchange for an agreement by us to not file a complaint, we attempted to settle the entire affair for what we believe to be a more than reasonable figure. This too was firmly rejected without any effort by the defense to negotiate.

Instead, as the record irrefutably shows, Mr. Gamblin and the local Court have continued to work as one to attempt to force us to sign something we never agreed to, and they have had the open support of the two attorneys whom we paid many thousands of dollars to represent us and to protect our rights. In the court records can be seen praise by Mr. Gamblin and the Court of Messrs. Holt and Rogers and criticism of us because we "would not follow the advice of our own attorneys".

An important element relative to the subject issue of whether the lower court Judge has used undue influence and exercised duress thereby vitiating any alleged agreement, is the fact that we repeatedly asked Messrs. Holt and Rogers verbally in writing to provide us with a statement of fact as to what they witnesses on May 13, 1993. We asked them in writing to "state the truth, no more and no less", to "think well, and do what is right", to "simply verify in writing what you previously told us". For several months they ignored our requests. On December 13, 1993, because we still had received no response from Messrs. Holt and Rogers, we drafted and sent to them an affidavit reflecting events which we along with Messrs. Holt and Rogers had witnesses, and events which they had told us they witnessed (in chambers on May 13, 1993). We asked them to sign this or let us know if there was any problem of any kind in doing so.

When later pressed by Lynn Wirtz about this, Mr. Holt said they weren't going to sign the statement because "we don't know what you are going to do with it". He did not so much as intimate anything in the draft was untrue or unfair in any way. Lynn Wirtz asked him to at least put their refusal in writing. This they did via FAX fourteen days later, simply stating that they "would sign no statements, affidavits, etc."

We had explained that we needed their testimony regarding off-the-record events in order to appeal our case to the Supreme Court; to no avail. Importantly, on several occasions Lynn Wirtz discussed with Mr. Holt and Mr. Rogers via telephone and confirmed via FAX, the events of May 13. In these exchanges neither ever took any exception to any of the facts listed above, except that Mr. Holt at one point said that his remark on May 13, 1993 about the Supreme Court affirming the directed verdict was his opinion only, and did not come from the Judge. He never denied that the Judge had told him and Mr. Rogers to tell us this was an $ 18,000 case, that we would receive no more, and that if we refused it, we faced a directed verdict.

Suddenly, via FAX of Thursday April 14, 1994, just before a hearing called by the defense for Monday April 18, Messrs. Holt and Rogers sent a letter denying that the messages they had given us on May 13, 1993 had come from the Judge. Because of the ominous import of this letter, on the afternoon of Friday, April 15, 1994 (some six months after Messrs. Holt and Rogers had withdrawn from the case), Lynn Wirtz called Mr. Holt and asked him if he intended to attend a hearing the following Monday morning (on defense objections to our Statement of the Evidence). Mr. Holt's exact response was "well, no not unless you subpoena me".

Mr. Holt was either deceiving Lynn Wirtz at the time, or he afterwards suddenly decided to participate, but decided not to advise Lynn Wirtz of that fact, so as to avoid the risk of cross examination. In either case, Mr. Holt did appear there (Meadville, MS) on Monday morning and he testified on behalf of the defense. We became aware of this three months later, on July 22, 1994 when we received via mail from the Circuit Clerk an order, and transcript of the hearing.

The transcript of the hearing shows that Mr. Holt swore as an "Officer of the Court" that he knew of no duress or coercion whatsoever being imposed upon us on May 13, 1993; that he supported in its entirety the defense counsel's lengthy "recitation of facts", and that he disavowed the fact that we had emphatically told him and Mr. Rogers on May 13 that regardless of anything else, we would not give up our rights to bring

evidence of Mr. Switzer's malpractice to the State Boards of Public Accountancy in Mississippi and Louisiana.

This transcript speaks for itself. Mr. Holt joined with the defense and the Court so as to indicate in the record that our submission under duress and with no tenable alternative (a directed verdict would mean more years and many thousands of dollars) was not that at all, but that there was an "agreement" (meeting of minds) after "negotiations" during a "settlement conference".

Let it be said that on May 13, 1993 we neither sought nor were allowed to participate in any "negotiations", but were placed in isolation and told hat we would accept $ 18,000 "or else"; our request to see the Judge was denied, and we were told to decide immediately.

After Mr. Holt had led Lynn Wirtz to believe on Friday afternoon (4/15/94) that he would not be at the hearing on Monday morning, we decided not to attend, but to allow the defense and Court enter into the record whatever they wished. This they have done.

Affiants hereby state that they deplore such disrespect for the truth, and such abuse of power. They further state that while having a strong desire for justice and rightful compensation, they are unwilling to exaggerate, omit relevant facts which may be to the favor of their opponents, or to otherwise unconscionably and unfairly deceive, and that this affidavit is as accurate and complete as we can make it, relative to the subject. Much of what is said here is well documented, and we stand ready to render our proofs and to answer under oath any questions regarding this affidavit.

Attached for reference is a flow diagram showing the history of this case. We believe it to be entirely accurate and fair and we invite any question or exception.

"s / Lynn Wirtz
Plaintiff and Appellant
Civil case no. 5701, Sixth Circuit
Supreme Court nos. 07-CA-59508, 94-TS-00040
94-TS-00728, 94-TS-00857

"s / Charlena Wirtz
Plaintiff and Appellant

Sworn and subscribed before me, this 19th day of September, 1994.
My commission expires on June 18, 1997.

"s / Joann Herrington"
Notary Public

APPENDIX "M"
FILED APR 15 1994
FRED FERGUSON, CIRCUIT CLERK
"s / _____"

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL DISTRICT OF ADAMS COUNTY, MISSISSIPPI

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ AND CLAY WIRTZ — PLAINTIFFS

NO. 5701

VS.

DENNIS R. SWITZER AND DENNIS R. SWITZER, CPA, LTD. — DEFENDANTS

RESPONSE TO DEFENDANTS' OBJECTIONS TO PLAINTIFFS' STATEMENT OF THE EVIDENCE

Plaintiffs/appellants hereby record their rebuttal:

1. The defense counsel has heretofore variously pled for this Court to entirely abrogate the appellants' rights by: (1) dismissing the plaintiffs' case (notwithstanding his lack of any response to plaintiffs' "Motion for Partial Summary Judgment" which was pending); (2) countermanding the right of the executrix, as the defendant's former client, to present evidence of his malpractice to the Mississippi and Louisiana State Boards of Public Accountancy; (3) striking the plaintiffs' "Designation of the Record"; (4) striking the plaintiffs' "Statement of the Issues"; (5) applying sanctions against the plaintiffs; and now by (6) striking the plaintiffs' "Statement of the Evidence".

2. In its several documents pertaining to the above, the defense makes it clear that it is now attempting to persuade this Court to improperly countermand the forwarding of the relevant documents and other evidence to the Mississippi Supreme Court, as appellants have the right to do under Rule 10.

Despite the fact that there has been no new trial as mandated by the Supreme Court, and no settlement, the defense is incredibly attempting to eliminate all issues which might result in judgments for damages and cost of recovery.

Let it be made clear that the $18,000.00 stipulated by the Court and which remains under the Court's control is entirely unsatisfactory as a means of settlement, for specific reasons which are described in "Appellants' Response to Defendant's Motion for Sanctions" (entered 2/11/94; pp. 1-8).

3. In addition to seeking to have the record withheld from the Supreme Court, the defense calls for this Court to punish the appellants via sanctions and deprivation of their fundamental rights to call for an investigation by the Mississippi and Louisiana State Boards of Public Accountancy. Such an investigation would do the defendant no harm if the complaint lacked substance.

4. Obviously, if Rule 10 permitted the defense to decide what issues if any are to be allowed to go forward on appeal, the tort claim and appeal system would collapse. Rules 10 (b)(1), 10 (b)(4), and 10 (c) make it clear that it will be the appellant (and neither the defendant nor the trial court) who will designate the record, state the issues, and "prepare a statement of the evidence or proceedings if no stenographic report or transcript of all or part of the evidence or proceedings is available". This is precisely what the appellants have done to the best of their ability and in complete good faith.

   Supreme Court rules 10 (c), 10 (d), 10 (e), and 10 (f) all stress truth and accuracy, and completeness concerning the documents which will go forward to the Mississippi Supreme Court. Rule 10 (c) which applies specifically to the "Statement of the Evidence" requires that this document be prepared and certified by the appellant as a "fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal".

   These specifications have been met. It is not the appellants' description of the events of March 29, May 6, and May 13, 1993 which is improper, but the events themselves. In no instance have the appellants exaggerated or otherwise embellished or distorted their report of those events. They have not in this or any other of their documents attempted to mislead or deceive; an all-to-prevalent practice which they deplore.

5. The appellants' "Statement of the Evidence" is certainly fair and accurate. In every instance where facts are given beyond the coverage of the specific events of the aforementioned dates, it is done to clarify

the record and to put the events of those dates into context concerning the issues in this case.

The appellants are exercising their right to bring forth on appeal an "accurate and complete" description of the actual events which are highly relevant to the issues defined by them. As the appellants pointed out in their "Statement of the Issues" (1/13/94), there has been no new trial and no settlement of this case, and "the appealable issues in this case are not limited to the terms of the settlement agreement allegedly reached". "All issues which were previously urged by the plaintiffs on original appeal to the Supreme Court (2/18/88) remain unresolved, except to the extent that the Supreme Court has resolved them".

In violation of Rule 10 (f), the defendant seeks to curtail the record by having relevant facts excluded from the plaintiffs' "Statement of the Evidence". The Supreme Court is very capable of deciding whether appellants' statements are relative to the issues and whether the appellants forwarded an "unnecessary" document, as the defense has previously claimed.

6. The grounds presented by the defense for the sanctions of the appellants and the striking of all of their documents need to be closely examined. These are as follows:

(A) "Appellants have 'totally', 'willfully', and 'flagrantly' 'disregarded' Rule 10 of the Mississippi Supreme Court."

Response: Even allowing for the usual bombast, this claim utterly lacks credibility. It is akin in its ludicrous nature to the defense counsel's prior claim that the plaintiffs' case should be dismissed because they were not trying to prosecute their lawsuit (despite the fact that plaintiffs' unanswered Motion for Partial Summary Judgment had been in defense counsel's possession for almost nine months when the Motion to Dismiss was filed.)

(B) The issues and documents the appellants intend to present before the Supreme Court do not meet the approval of the defense attorney because they do not confine themselves to the issue he is willing to admit yet remains. That issue is whether the trial court has the authority and should deny the plaintiffs their (non-waived) right to render evidence of the defendant's malpractice and resultant damages, to the Mississippi and Louisiana State Boards of Public Accountancy.

Response: The defense desires to sweep all other issues aside by claiming that on May 13, 1993 "the **parties** (e.a.) participated in a settlement conference with the Court", and that they "entered into a

valid and binding settlement agreement" which "constituted a complete accord and satisfaction of all claims..." ("Opinion and Order on Motion of Defendants to Enforce Settlement Agreement" (12/7/93; p. 4)).

The validity of this claim is similar to that of defense counsel's prior assertion in his brief to the Supreme Court that "the executrix never tendered the defense of the suit instituted against her by the heirs to Switzer, nor afforded him any opportunity to hire his own attorney and take over the defense of the case" ("Brief for Appellees" 3/13/89; p. 16)). (In fact, as the defendant and his counsel well know, the executrix personally and with Switzer's attorney present, tendered him the defense on March 2, 1984.)

The problem with the defense counsel's depiction of the events of May 13, 1993 is that the plaintiffs Mr. and Mrs. Wirtz appeared at court for trial, had not authorized nor encouraged their attorneys to negotiate or argue for a settlement, and then, contrary to the assertion of the defense counsel, were denied permission to "participate in a settlement conference with the Court", which was held without notice, at the instigation of the Court and/or defense, while a jury waited.

As described in detail in their "Statement of the Issues" (1/13/94; p. 2) and their "Response to Defendant's Motion for Sanctions" (2/11/94; pp. 1-8), the outcome of the "settlement conference" was in the form of an ultimatum from the Court, to accept a Court-stipulated $18,000.00 in lieu of trial. The plaintiff parties were thus denied permission to so much as witness the discussions in chambers which were intended to allow the defendant to escape trial and to send the plaintiffs away with no compensation for three-fourths of their monetary losses which had been solely caused by the defendant's malpractice and refusal to accept any responsibility for the past decade.

There was to be no compensation for nearly ten years' stress and deprivation of family/leisure time; and as it later turned out, plaintiffs were to be deprived of their non-discussed/non-waived right to present facts to the state boards of public accountancy in Mississippi and Louisiana. There was to be no punitive action for the defendant having willfully abandoned his client (with fully foreseeable resultant damages to her finances and reputation) upon being tendered the defense of the lawsuit he had caused to be filed against her. There was to be no action taken against defense counsel for his totally unscrupulous fabrications which included a blatant attempt to falsify the record by libelously indicating that the executrix had exercised undue influence and fraud concerning the testatrix and her will. This matter has been addressed in various documents by the plaintiffs, most recently in their "Statement of the Evidence" (3/7/94; pp. 4-11).

(C) On page 4 of his "Objections to Statement of the Evidence", defense counsel disputes what the appellants' counsel told them was being said in chambers on the morning of May 13, 1993.

Appellants respond to these defense counsel's objections as follows:

1. The appellants appeared at court for the trial then were denied admission to the Court's settlement/disposition of their case. These discussions/decisions/instructions were unrecorded, and the appellants' attorneys were commanded to instruct Mr. and Mrs. Wirtz to make crucial decisions on the spot, without prior notice, and while a jury waited. Nothing was put in writing.

2. Under these circumstances, the appellants had absolutely no choice. They had to make a sudden decision and they had to rely entirely upon their attorneys' word as to what the Court's commands were, and for an explanation as to the reasons therefor.

3. They made their decision under severe duress, based entirely upon what they were being told. They have faithfully recorded in their "Statement of the Evidence" exactly what they were told, according to Rule 10 (c) and to their own conscience. They believed their attorneys were giving an accurate report on May 13, and have encountered no cause to change that view, to this day. In fact, they took the precaution of confirming several times with their attorneys after the fact, that the key points and thrust of the Court's conference with, and instructions to the attorneys were just as the plaintiffs had been told on May 13.

4. Regardless of whether arguable subjective interpretations or different understandings of nuances exist among defense and plaintiff attorneys and the Court regarding the specifics of the discussions of May 13, 1993, the plaintiffs whose rights were at stake suffered the actual thrust of those discussions and of the decisions of this Court.

5. The Court and attorneys for both parties certainly knew what the resultant duress and impositions would be upon the plaintiffs.

6. The Court's objective that day was to avoid a trial and have the plaintiffs verbally submit to a minimal monetary settlement. It achieved that objective through the duress it imposed. It is not so important that plaintiff counsel and defense counsel disagree on the precise methods by which it achieved that objective.

Since defense counsel disputes plaintiffs' counsel's description of the factors which the Court imposed upon the plaintiffs to force them into submission, then he should be asked to explain how it was done. There certainly is no credibility to the suggestion that plaintiffs would spend many more thousands of dollars in preparation for trial in hopes of finally receiving justice and reasonable compensation, and then simply agree to forfeit the major portion of their pecuniary losses plus any award for many years of mental anguish and deprivation, and particularly, their right to present evidence to the state boards of public accountancy. This, as they had previously recorded in their "Motion for Partial Summary Judgment" (July 13, 1992; pp. 36-38) and other earlier documents, plaintiffs have always considered their duty.

7. Response to defense "item by item" objections:

I. Hearing on Motion to Dismiss (March 29, 1993) (p. 2; "Statement of the Evidence"): Rule 10 (c) permits the appellants to file a complete and truthful report of what transpired off the record, so long as it is relevant to the issues. The defendant has no grounds for complaint, as the entirely improper events occurred just as described.

II. Bramlette deposition (May 6, 1993) (p. 2; "Statement of the Evidence"): This matter is now highly relevant to the issues of this case; the defense has made it so. It is a fact that plaintiffs were completely misinformed by defense counsel as to the purpose of the impending deposition and it is a fact that much of the content of this document is untrue and unfairly prejudicial, and beyond that, was entirely irrelevant at the time. Appellants stand firmly behind everything they have said about this document and their prior offer to allow it to be expunged without penalty is hereby withdrawn.

III. May 6, 1993 pre-trial hearing (p. 2; "Statement of the Evidence"): Defense counsel here takes the role of saying what is not at issue in this case. As previously covered under item 4 of this "Response to Defendant's Objections to Statement of the Evidence", he does not have the authority to do so. The defendant's "Response to Plaintiffs' Motion in Limine" (5/6/93) is particularly relevant to the issues.

IV. Trial/discussion in chambers on May 13, 1993 (p. 3; "Statement of the Evidence"): Appellants' position on this is covered in the prior sections of this "Response to Defendant's Objections to Statement of the Evidence".

V. Plaintiffs' letter of September 13, 1993 to Judge Watson (p. 12; "Statement of the Evidence"): First, there has been no "settlement". This matter is highly relevant to the issues because it relates to a simple

good-faith request to the Court for an explanation as to how and when the plaintiffs were "out of line" in the Court's view, so as to arouse the obvious and sustained ire of the trial judge. Defense counsel was copied with the letter at the time of its production. As stated, no response was received.

VI. April 7, 1993 order and trial/settlement discussions of May 13, 1993 (pp. 3-4; "Statement of the Evidence"): Appellants' response to the pertinent objections is covered under sections 6 (B) and 6 (C) above.

In summary, Rule 10 (c) of the Mississippi Supreme Court provides appellants the right to present a "statement of the evidence", covering what transpired during proceedings which are off the record. Rule 10 (f) clearly forbids any tampering with same. The defense has the right to object if it can show that the "statement of the evidence" is inaccurate, unfair, or incomplete. This the defense has not done.

There is nothing in Rule 10 which allows the defense to object to the "statement of the evidence" on grounds that any item is "not at issue". The defense counsel has done this throughout his "objections". Rule 10 (e) allows the trial judge to modify the record only to such extent as will make in conform to the truth. Omissions or misstatements in the record may of course be corrected by stipulation of the parties or by the judge.

In light of the foregoing, appellants hereby claim that the defendant's objections are ill-founded in that it has by no means been shown that the "Statement of the Evidence" is in any way inaccurate, unfair, or incomplete; and in that the defendant cannot by law sweep aside any segment of the "Statement of the Evidence" by simply stating that a certain matter is not at issue. It is noted that under Rule 10 comments, appellants may bring forth additional issues in their brief.

Appellants respectfully submit that this Court should summarily deny the defense counsel's efforts to have the appellants' rights under Rule 10, abrogated.

Regarding the defense counsel's request for yet another hearing, appellants hereby state that the foregoing covers their response to his objections, and would respectfully request that this Court take its actions upon the basis of same.

Appellants will file to supplement the record so as to include the defendant's "Objections to Plaintiffs' Statement of the Evidence", and this response to same.

Respectfully submitted in proper person, this 15th day of April, 1994,

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ
PLAINTIFFS

By:

"s/ Charlena Wirtz"
Charlena Wirtz, Executrix

"s/ Lynn Wirtz"
Lynn Wirtz

"s/ Andrew Wirtz"
Andrew Wirtz

"s/ D. Clay Wirtz"
Clay Wirtz

CERTIFICATE OF SERVICE . . .

APPENDIX "N"

RECEIVED AND FILED MAR 07 1994
FRED FERGUSON, CIRCUIT CLERK
By: "s / Fred Ferguson"

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL DISTRICT OF ADAMS COUNTY, MISSISSIPPI

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ AND CLAY WIRTZ — **PLAINTIFFS**

NO. 5701

VS.

DENNIS R. SWITZER AND DENNIS R. SWITZER, CPA, LTD. — **DEFENDANTS**

STATEMENT OF THE EVIDENCE

Now into court come appellants, in proper person, pursuant to Mississippi Supreme Court Rule 10 (c) and submit this statement of relevant proceedings and facts not recorded and which relate directly to their "Statement of the Issues", filed on January 13, 1994, pursuant to their appeal of the trial court's "Opinion and Order" entered on December 7, 1993.

I. Hearing on "Defendant's Motion to Dismiss", (March 29, 1993).

On July 13, 1992 Plaintiffs had filed and served on the defense counsel, a "Motion for Partial Summary Judgment", as well as a "Brief in Support". Defense counsel asked for and received an extension of time from Plaintiffs' attorney, but never responded to this document. Instead, on March 15, 1993, he filed a "Motion to Dismiss". Meanwhile, Plaintiffs had dismissed their attorney, obtained new counsel, and were preparing for their case.

During the interim period of August to December, 1992, the Plaintiffs had difficulty obtaining counsel for this mature case, but kept the court thoroughly advised as they diligently sought legal representation,

(p.4; Plaintiffs' "Brief in Support" of their "Response to Defendant's Motion to Dismiss", March 25, 1993). During these communications with the court the Plaintiffs were never given the slightest indication that the court considered them guilty of any failure or misconduct.

Nevertheless, in the transcript of the subject hearing, it is evident upon reading, that the trial court judge was openly sympathetic with the defense counsel and "out of patience" with the Plaintiffs, whose conduct he characterized as "almost tantamount to obstructing justice" and "something he will not tolerate". This ire was a shock to the Plaintiffs and their attorneys, none of whom had appeared before this trial court judge previously.

When defense counsel indicated that he wanted to take the deposition of United States District Judge David Bramlette, (S.D., Miss.), "to be used at trial", the trial court judge encouraged him to do so and later, off the record, expressed his long-term friendship with Judge Bramlette in the immediate presence of both the Plaintiffs and their attorneys, (see section 2, infra).

Plaintiffs' concern increased when at the end of the recorded session the trial court judge also proclaimed that he maintained a long-term friendship with the Honorable William O. Carter, a senior officer of the defense counsel's law firm.

The defendant's "Motion to Dismiss" was obviously ill-founded and dismissed without argument. However, the Plaintiffs were sternly commanded to appear for trial on May 13, 1993 "whether you have a lawyer or don't have a lawyer---or it (the Plaintiffs' lawsuit against the defendant) will be dismissed". On April 7, 1993, the trial court judge, in fact, issued an order very similar in spirit to this proclamation. This "Order", referred to in the "Opinion and Order" (p.2), groundless as it was, played a very significant role in the events that transpired on May 13, 1993, at the aborted trial/settlement discussions. This will be fully explained in section VI, infra. The premise implicit in this "Order" is that the Plaintiffs were somehow responsible for the events transforming a clear-cut case of accountancy malpractice into an ongoing nine-year ordeal, subjecting them to inordinate expenditures of time and expense; when, in fact, it is well documented that it has consistently been the diversionary and unscrupulous tactics of the defense counsel which has delayed and obstructed justice throughout the pendency of this litigation, (see Plaintiffs' "Response to Defendant's Motion for Sanctions").

In their "Response to Defendant's Motion to Dismiss", Plaintiffs had pointed out that the defendant had never responded to their "Motion

for Partial Summary Judgment"; but the trial court judge did not acknowledge same. While it is plain to see that there can be no grounds for dismissal due to abandonment, when the party against whom the dismissal is urged has a pending motion before the court; the trial court, although denying the motion urged by the defense counsel, nonetheless issued an order which would later serve as a means to coerce the Plaintiffs into forfeiting their right to a jury trial, (see discussion in section VI, infra).

II. Deposition of U.S. District Judge David Bramlette (May 6, 1993)

This document has not been filed as of February 28, 1994. Plaintiffs were outraged by its contents and avowed purpose (to be read to a jury, with the deponent in absentia), and demanded via several memorandums to defense counsel that it be expunged and that Plaintiffs be provided certification of same. Plaintiffs were willing to "forget" the entire affair; however, no certification has been received and therefore Plaintiffs must assume that this unprivileged document remains at large.

Plaintiffs' attorneys had been advised by defense counsel only that the deposition would address two certain amounts of money ($4,500.00 and $4,825.55) which the defense counsel claimed should be deducted from any damages awarded to the Plaintiffs, (a claim which in itself is ill-founded for reasons set forth in Plaintiffs' "Reply Brief to the Supreme Court" , May 1989, pp. 10,11).

Instead, the deposition makes no attempt to establish that the $4,500.00 has any relevance and does not so much as mention the $4,825.55; but rather, is a concerted attack on Mrs. Wirtz' integrity by implicitly suggesting that she exerted undue influence and committed fraud concerning the will and testament of Lena Watson Whitley. To place the defense strategy in context, suffice it to say that current U.S. District Judge David Bramlette was in 1983 and 1984 the attorney for certain heirs who both unreasonably demanded distribution before the estate taxes could be calculated by the defendant, and threatened to contest the will. Two days before the two-year statute of limitations for contesting a will had expired, Judge Bramlette on behalf of the heirs, submitted a reasonable settlement draft, which was finalized on January 3, 1984.

As the record shows, ("Deposition of Lynn Wirtz", November 7, 1985, p. 26), Judge Bramlette was forced to remove from his draft, wording which stated that it was the executrix, and not he, who had sought compromise, and wording that she had compromised under the threat of a will contest.

Nevertheless, when it was discovered that the defendant, Dennis Switzer, had carelessly omitted over thirty thousand dollars of tax liability from the accounting which was the basis of the settlement agreement and which was discussed "daily" by Mr. Switzer and Judge Bramlette during its preparation (according to the defendant's own deposition of May 26, 1986, p. 79), Judge Bramlette seized upon this opportunity to enrich himself and/or his clients at the personal expense of the executrix and her family who were residuary legatees.

Despite an immediate and full explanation of the mutual material mistake provided by the Plaintiffs, Judge Bramlette sued the executrix for $30,956 plus $75,000 punitive damages and costs, and accused her in the public record of fraud and "maliciousness". In his lawsuit, Judge Bramlette again accused Mrs. Wirtz of impropriety regarding the will of Lena Whitley, despite a total absence of any evidence to substantiate this claim, ("Complaint, No. 32406 ", February 21, 1984).

Appellants hereby state that the deponent has never produced a scintilla of evidence to support his accusations against Mrs. Wirtz, and that she and her family have suffered irreparable harm to their reputation therefrom. In any event, appellants challenge the planning, execution, and content of this deposition on the basis of relevance and propriety. Consequently, the Plaintiffs believe that the trial court judge acted in violation of Judicial Canons, and acted in a manner designed to intimidate the Plaintiffs when he encouraged the defense counsel to depose Judge Bramlette, (Judicial Canons 1,2,3(c), Mississippi Code of Judicial Conduct).

Two specific claims in this deposition are that " a law firm had done a considerable amount of investigation into this matter and had prepared a lawsuit based on undue influence . . .", (Judge David Bramlette's Deposition, p. 15); and that the First Baptist Church of Natchez, Mississippi, had considered litigation against Mrs. Wirtz, (id.). Neither of these alleged events ever happened, and it would of course be entirely irrelevant to this case had they actually occurred. However, these statements were nonetheless offered in an attempt to prejudice the jury against the Plaintiffs in the event that this case would ever, in fact, be submitted to a jury.

The deponent was present at the first trial on November 4-5, 1987, to testify for the defense. Plaintiffs had been given no information whatsoever as to the nature of that testimony, which was not rendered because of a directed verdict.

On July 20, 1992, Plaintiffs' attorney was informed by defense counsel that the defense would take Judge Bramlette's deposition

concerning the two amounts of money ($4,500.00 and $4,825.55) previously mentioned.

Despite the time lapse between then and May 6, 1993 the deponent said he had not had time to prepare for his deposition and would not remember "some of the facts", (id., p.6). He did not "remember" the following:

(A) In court on November 10, 1983, at a hearing called by the deponent, the executrix submitted to a verbal order of the chancellor and wrote four equal checks totaling $33,000.00, and handed them to the deponent. However, in the deposition, he stated that "the initial payment ordered by Chancellor Zuccaro was not timely made".

(B) That the present lawsuit against Dennis Switzer had gone to trial and that the deponent was present at that trial.

(C) That the estate's attorney F.A. Johnson, Jr. had explained to the deponent in their initial conversations that the executrix could not distribute funds and property to Judge Bramlette's clients until Mr. Switzer had calculated the estate's tax liabilities because the I.R.S. holds executors fully responsible for the same.

(D) Whether any part of the $56,320 estate tax liability shown on Switzer's accounting was ever paid by the executrix (it was) or by his clients.

(E) Whether the I.R.S. ever claimed that any windfall profit taxes were due from his clients.

(F) That, without the knowledge of the executrix or her attorney, Judge Bramlette had obtained a court order from Chancellor Joseph Zuccaro and withdrawn $44,000 from estate funds which had been placed into an interpleader account, supposedly under court protection, pending resolution of his lawsuit.

(G) The amount of money the executrix paid him to settle the lawsuit which he had filed against her on behalf of the heirs, nor that the $15,000.00 check Mrs. Wirtz deposited in his firm's name was for that purpose.

In essence, Plaintiffs view the planning and execution of this deposition as an illicit act, the purpose of which was to create diversion, intimidation, and prejudice.

III. Pretrial hearing of May 6, 1993

Plaintiffs were not allowed to attend this discussion in chambers. From their own knowledge and from what they were told by their attorneys

in the moments immediately subsequent to these described events, they record the following:

1. Plaintiffs' "Motion to Allow Plaintiff Lynn Wirtz to Sit at Counsel Table", (May 3, 1993).

The trial court judge in the original trial on November 4 and 5, 1987, had erroneously ruled that Mr. Wirtz was a nominal plaintiff, and decided that Mr. Wirtz would not be allowed to sit at the counsel table. At this hearing defense counsel argued for the exclusion of Mr. Wirtz from the counsel table, but permission was nonetheless granted.

2. Plaintiffs' "Motion to Amend Original Complaint", (May 3, 1993):

This was aimed at inclusion of attorney's fees and other costs incurred since the original complaint was filed in 1985, but was denied.

3. Plaintiffs' "Motion in Limine", (April 30, 1993):

This was aimed at preventing the entry of entirely irrelevant and prejudicial testimony; namely, revealing to the jury the actual amount of money that the Wirtz family received as residuary legatees.

Defense counsel made the outlandish argument that he should be allowed to tell the jury how much money the Wirtz family received and how much they would have received under an earlier will, in order to suggest that Mrs. Wirtz may have used undue influence; and if this were the case, that this alleged wrongdoing might be considered "contributory negligence" on the part of the executrix, thus absolving Mr. Switzer of responsibility for any damages which his negligence might have caused the estate, (see "Defendant's Response to Motion in Limine", May 6, 1993). Defense counsel went on to argue that because the Wirtz family signed the settlement agreement of January 3, 1984, it might mean that Mrs. Wirtz had something to hide and feared a will contest.

Aside from these allegations being totally irrelevant to the suit for damages against his client, Mr. Gamblin is well aware of the following facts which utterly refute his speculative and specious allegations:

i. There is no evidence anywhere that the executrix ever sought any compromise with the heirs or ever in any way yielded to any threat of a will contest. On the contrary, with only two days remaining on the two-year statute of limitations within which to contest the will of Lena Whitley, it was the attorney for the heirs, Judge David Bramlette, who urgently called a conference and offered a settlement draft which included very significant compromises on the part of the heirs.

ii. The fact that the executrix never attempted to claim the bulk (five-sixths) on the oil income and properties (upon which her family had firm legal grounds to place a claim, according to Paragraph III of the will and testament of Lena Watson Whitley, as interpreted by attorney C.G. Smith, counsel appointed by the Chancery Court, Adams Co., Miss.), represents no compromise on her part, because as defense counsel well knows, the executrix never intended to claim it anyway, simply because Mrs. Whitley was her friend and confidant, and had never mentioned that she intended to leave any of the oil properties to the Wirtz family, ("Deposition of Lynn Wirtz", November 7, 1985, pp. 24,25; Trial Transcript, pp. 191,192).

iii. Not one scintilla of evidence has ever been produced to indicate or show that Mrs. Wirtz used undue influence or any influence for that matter, upon her friend of twenty-one years, regarding the distribution of her estate.

Further, it should be mentioned that the deadline to charge and try Mrs. Wirtz for undue influence expired on January 5, 1984, before which date the heirs had two years to develop a case against her.

iv. Defense counsel is also aware that on January 3, 1984 when the attorney for the heirs tried to include wording in his settlement draft which would indicate that the Wirtz family was yielding to a threat of will contest, he was forced to remove that wording before the Plaintiffs would sign the agreement, ("Deposition of Lynn Wirtz", November 7, 1985, p. 26).

Instead of defending his client by ethical means, the defense counsel has persistently fabricated outrageous attacks upon the integrity of the executrix in order to create diversion and prejudice. The trial court took the matter of Plaintiffs' "Motion in Limine" and defense counsel's "Response" under advisement.

4. Plaintiffs' Verbal Motion that Mr. Wirtz be allowed to testify as to his mental anguish/deprivation of family/leisure time over the past nine years:

Plaintiffs' were told by their attorneys that this was granted, but have never seen anything in writing.

IV. (Aborted) Trial/Discussion in Chambers, (May 13, 1993):

For a description of the unrecorded events and circumstances of this day, see Plaintiffs' Statement of the Issues, filed January 13, 1994, (items 3 through 8); and Appellants' Response to Defendant's Motion for Sanctions, filed February 11, 1994, (pp. 1-7; pp. 17,18, item 2), and section VI., infra.

V. Because of the anger and threat of sanctions from the trial court judge, Plaintiffs were sincerely disturbed and puzzled, and wrote the trial judge a letter on September 13, 1993, merely asking for an explanation as to what it was that the court perceived as failures or misconduct on their part. The trial court never responded.

VI. The "Order" Entered on April 7, 1993, and the Aborted Trial/Settlement Discussions of May 13, 1993

The "Order" of April 7, 1993, issued by the trial court judge was undeniably inappropriate. However, the Plaintiffs were diligently preparing for trial, and did not foresee the danger in that particular "Order". On May 13, 1993, it became clear that the danger lay in the bias against them which both motivated the trial court judge to issue the groundless order of April 7, 1993 and motivated him on May 13, 1993. As discussed in the Plaintiffs' "Statement of the Issues", the Plaintiffs were not allowed by the trial court judge to participate in the settlement discussions. However, the following events were described to them by their attorneys in detail, immediately after each session amongst the attorneys and the trial court judge was concluded:

1. On May 12, 1993, the defense counsel filed a "Motion to Exclude Expert Testimony". The grounds for the defense counsel's objection to the expert testimony of Cathy Reed, CPA, were that the defense counsel was not timely notified as to what Ms. Reed would testify at trial, and therefore the new expert witness's testimony would be "highly prejudicial to Switzer's defense". It is important to note that the Plaintiffs had already provided expert testimony from Wayne Galloway, CPA, at their original trial. The defense counsel made no objection to the expert testimony at the original trial, and he had a full opportunity to depose and cross examine the Plaintiffs' expert witness at that time. After the Supreme Court of Mississippi reversed and remanded this lawsuit for trial following the trial court's directed verdict in the defendant's favor, the issues were identical. The same parties, the same issues of fact and law, the same case was at issue upon remand. Therefore, it was always the intention of the Plaintiffs

to merely utilize the previous trial testimony of their expert witness, Wayne Galloway, CPA, at their trial on remand. Obviously, the defense could not be prejudiced by the use of the trial testimony of the Plaintiffs' former expert witness, when the same case in chief was to be heard by the trial court. Therefore, there was no need to supplement their response to any interrogatories as to that expert witness posed by the defense from the first trial; since, the issues were identical.

However, the Plaintiffs themselves took the added precaution of hiring another expert witness, who if necessary, could produce live testimony at the trial. At the hearing of the defense counsel's "Motion to Exclude Expert Testimony", another matter altogether was addressed by the trial court. This matter is crucial in understanding the events which occurred on the morning of May 13, 1993 which resulted in the denial of the Plaintiffs' right to a jury trial; and yet, because they occurred in chambers, they were prevented from entering the record. Therefore, it is necessary that the Plaintiffs file this "Statement of the Evidence", pursuant to Rule 10(C), Mississippi Supreme Court Rules, so that an accurate account of this, and other unfairly prejudicial court proceedings might be presented to this court, and more importantly, the Supreme Court of Mississippi, for review.

At this hearing, defense counsel objected to the testimony of Plaintiffs' expert witness, Cathy Reed, CPA, on the grounds set forth in his motion; namely, that he was not timely notified and therefore her testimony would be highly prejudicial to Switzer's defense. At this point, the trial court judge told the defense counsel that in light of his objection, he would "give Mr. Gamblin the choice of which expert testimony the Plaintiffs would be allowed to use; and that if he chose Ms. Reed, the court would grant him a directed verdict, because her testimony was insufficient". Seizing the opportunity to himself rule the highly damaging testimony of Mr. Galloway inadmissible, Mr. Gamblin informed the judge that the defense chose Cathy Reed as the Plaintiffs' expert witness. At this point the mockery of justice and the trampling of the Plaintiffs' rights was well underway, all the while as they were sequestered in a room unto themselves.

Plaintiffs hereby record that Ms. Reed had recently completed a five-year term of service as chairperson of the Mississippi Stated Board of Public Accountants, and Plaintiffs entirely reject the idea that her testimony would be in any way insufficient. It is at this point that it is important to understand the significance of the trial court's "Order" of April 7, 1993. For now, the trial court judge was ruling that there would in effect be no trial on May 13, 1993, for reasons attributable to the

Plaintiffs' attorneys; since the Plaintiffs were left with no choice other than to accept $18,000.00 and drop the lawsuit against the defendant, or else receive a directed verdict in the defendant's favor. Then, the trial court judge arbitrarily declared that the Plaintiffs would either accept $18,000.00 and drop the lawsuit against the defendant, or the defendant would receive a directed verdict in his favor. This figure of $18,000.00 was decided upon by the trial court judge to be the value of the Plaintiffs' lawsuit, despite the fact that the Plaintiffs had the previous day worked around the clock to provide documentation of their damages at the trial court judge's own request; and this documentation which was by no means an entire account of all of the Plaintiffs' damages since it was produced on such short notice, proved damages in excess of $60,000.00 directly attributable to the defendant's accounting negligence.

If this situation does not amount to duress, and does not vitiate any consent to a settlement agreement, then Plaintiffs indeed must misapprehend the meanings of those words. Even the verbal settlement agreement which was reluctantly capitulated to by the Plaintiffs under these circumstances did not include any discussion of the waiver of their rights to complain to the State Boards of Public Accountancy, or any other regulatory or professional organization, as has been discussed in other documents which the Plaintiffs' have recently filed. Nevertheless, these proceedings, which were heretofore unrecorded, were the reason that Plaintiffs have been denied the right to a jury trial after devoting a great majority of the past decade of their lives to ensure and protect their right, so that other citizens of both Mississippi and Louisiana would not one day be victimized by the lack of professionalism, which throughout this case, both the defendant, Dennis Switzer, and his attorney, Richard D. Gamblin have exemplified.

The Plaintiffs hereby respectfully submit this "Statement of the Evidence", pursuant to Rule 10(C), Supreme Court Rules of Mississippi, and further protect their right to appeal the proceedings conducted in the trial court, which have heretofore been unrecorded.

Respectfully Submitted,

"s / Charlena Wirtz" "s / Lynn Wirtz"

"s / D. Clay Wirtz" "s / Andrew Wirtz"

CERTIFICATE OF SERVICE . . .

APPENDIX "O"

RECEIVED AND FILED FEB 11 1994
FRED FERGUSON, CIRCUIT CLERK
BY: "s / Fred Ferguson"

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL DISTRICT OF ADAMS COUNTY, MISSISSIPPI

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ — **PLAINTIFFS**

NO. 5701

VS.

DENNIS R. SWITZER AND DENNIS R. SWITZER, CPA, LTD. — **DEFENDANTS**

APPELLANTS' RESPONSE TO DEFENDANT'S MOTION FOR SANCTIONS

Now into court come appellants, in proper person, who have carefully reviewed defense counsel's "Motion for Sanctions", and believe they well understand its arguments and purpose. Appellants have again reviewed Rule 10 of the Mississippi Supreme Court and the comments appended thereto and will respond to the defendant's "Motion" on a point-by-point basis.

Regarding section (3) of defendant's "Motion", appellants deny any violation of Rule 10 or any "flagrant disregard" of this rule and will show that the defendant's "Motion" is totally groundless, and that in fact, the appellants have followed Rule 10 according to both its letter and spirit.

General

The defendant bases his argument for sanctions and the striking of the "Designation of the Record" and the "Statement of the Issues", upon a false premise or assumption that there exists a "valid and binding, full and complete settlement agreement, constituting a complete accord and

satisfaction of all claims", (Opinion and Order on Motion of Defendants to Enforce Settlement Agreement, p.4; rendered December 7, 1993 and appealed by Plaintiffs, said document hereinafter referred to as "Opinion and Order").

If in fact there existed such a settlement agreement the defendant would have surely attached it as an exhibit to his motion or to his prior "Opinion and Order" which was entirely authored by the defense counsel and signed by the trial court judge.

In actuality, there exists only the following:

1. An unsigned draft written by defense counsel and which was rejected by appellants because it embodied two entirely unacceptable added conditions which were never mentioned to the Plaintiffs or their attorneys at the aborted trial/discussion in chambers, of May 13, 1993.

These unacceptable added conditions are:

(A) Effective waiver of Plaintiffs' right to submit complaints and present evidence of the defendant's accounting failures and unprofessional conduct not meeting the standards of the state boards of public accountancy in Mississippi or in Louisiana.

(B) Wording in defense counsel's draft which demands that Plaintiffs "construe" the agreement by defendant to render the court-stipulated amount of $18,000.00 (about one-fourth the Plaintiff's actual costs), in a certain way which would be tantamount to an admission or concession by Plaintiffs that they had filed a frivolous or otherwise improper lawsuit, and therefore an acknowledgment that they capitulate to the defendant's continued denial of any fault; i.e., an acknowledgment that Plaintiffs alone are responsible for all damages to the estate of Lena Whitley, (see Ex. "B", "Opinion and Order"; Draft of Defense Counsel's "Full, Complete, Absolute Release").

2. An admitted verbal submission of Plaintiffs Mr. and Mrs. Lynn Wirtz, under duress, on May 13, 1993 when their attorneys informed them that the court was giving them an ultimatum that they would either accept partial restitution, of $18,000.00, or see the defendant granted a directed verdict, and "get nothing". They were also told that "the Supreme Court will affirm and you'll just be out a lot more money".

3. Written affirmation at one point that (despite the conditions of their submission on May 13, 1993), Plaintiffs would abide by their word if, **and only if**, the defense would not add conditions as mentioned above,

(see Plaintiffs' "Response to Defendant's Motion to Enforce Settlement Agreement", sect. 10; filed August 27, 1993).

However, the defense counsel totally rejected both the concession (waiver of any objection to the duress) and the condition demanded by Plaintiffs (removal of the two added conditions, 1(A) and 1(B) above). Instead, he continued to insist that conditions never mentioned on May 13, 1993 be incorporated into a release; namely, forfeiture of Plaintiffs' right to file complaints with the boards of public accountancy, and the outrageous demand that Plaintiffs in effect take responsibility for the losses to the estate, which the executrix was sworn to preserve.

As seen in the transcript of the hearing on defendant's "Motion to Enforce Settlement Agreement", August 30, 1993, both the defense counsel and the court admit that Plaintiffs' right to bring evidence before the boards of accountancy was never broached on May 13, 1993.

The Plaintiffs object to the circumstances of duress which left them with no reasonable alternative other than to accept the court's ultimatum. These circumstances are attributable to the improper actions of this court, and Plaintiffs have preserved and maintained their right to appeal the trial court's actions to the Supreme Court of Mississippi, according to the Mississippi Rules of Civil Procedure and the Mississippi Supreme Court Rules, in good faith and in accordance with all ethical and legal principles.

4. The absence of any new trial as mandated by the Supreme Court of Mississippi on November 4, 1991. Instead, there is only continuing controversy and expenditures, repetitive and groundless demands for sanctions, and other tactics employed by the defense in an effort to deny the Plaintiffs their fundamental right to a jury trial, (there was a prior demand for sanctions in the "Opinion and Order", in which the defense counsel based that demand upon the assertion that Plaintiffs were "recalcitrant", since they would not sign the his unabridged "full, complete, absolute release" as previously described (see "Opinion and Order", p. 6). Yet, the defense counsel admits, and the trial court judge has affirmed, that a waiver of the Plaintiffs' right to complain about the defendant's negligent and unprofessional actions to the Mississippi or Louisiana State Board of Public Accountancy, or to any other governing or regulatory organization, was never discussed in the settlement negotiations, (see "Opinion and Order", pp.4-5).

There certainly has been no settlement, for the following reasons:

I. Despite the false and deliberately misleading assertion on p.2 of the "Opinion and Order", the parties did not "participate in a settlement conference with the court". Plaintiffs Mr. and Mrs. Wirtz were in fact sequestered in a separate room and their request to speak to the judge was denied without explanation.

II. Obviously, there was no meeting of the minds. It cannot be argued that Plaintiffs and defendants do not claim different perceptions of the terms of the "agreement". Both parties, and the court agree that nothing was discussed on May 13, 1993 except an end to the litigation. Thus, despite the claim by the court and the defense that Plaintiffs added a condition (non-waiver), instead it was the defense counsel who added a condition of waiver.

III. Plaintiffs Lynn and Charlena Wirtz were isolated from all settlement discussions, and subjected to duress. Their attorneys, without even the authority from their clients to enter into a settlement agreement which the defense counsel argues was reached, served as only messengers, periodically and perhaps only partially informing the Plaintiffs as to what the trial court judge and the defense counsel were agreeing would be the final compromise and settlement agreement.

IV. The Plaintiffs were not allowed to participate, even to the extent that they could make an offer of compromise and settlement. Rather, they were told that they were to accept immediately the $18,000.00 in return for dropping the lawsuit against the defendant, or receive a directed verdict in favor of the defendant, and therefore receive nothing. In the meantime, a jury waited, and the Plaintiffs were told by their attorneys that it was their firm belief that the Mississippi Supreme Court would not reverse the decision. Thus, the Plaintiffs were given two choices by the trial court; accept $18,000.00; or nothing, and in fact face future expense and inordinate amounts of time in attempting to combat a continuously fraudulent and unscrupulous defense.

Plaintiffs had prepared for trial and were totally shocked at the turn of events. They knew something was very wrong and demanded an explanation from their attorneys. They were told that the trial court judge had ruled that neither the testimony of their expert witness (CPA) from the prior trial nor the testimony of their recently hired expert witness (CPA) would be satisfactory. Plaintiffs herewith state that they will challenge this action in their forthcoming appeal.

V. No reasonable restitution was offered. $18,000.00 is about one-fourth the pecuniary damages to the estate of Lena Whitley; with no compensation for damage to the reputation of the executrix, Charlena Wirtz, who was falsely accused of fraud in the public record, (lawsuit against estate filed on February 21, 1984, proximately caused by accounting errors solely attributable to the defendant); and no compensation for mental anguish and deprivation of countless hours/days of leisure/family time and infringement of family livelihood over the past decade.

VI. The defendant irresponsibly and adamantly continues to deny any fault whatsoever for the Plaintiffs' damages, despite the fact that no evidence has ever been introduced to show that an overt act taken by the executrix damaged the estate, or that contributory negligence on the part of executrix damaged the estate; nor has there ever been any evidence introduced to show that an intervening cause between the defendant's gross negligence and the damages to the estate exists.

VII. Long prior to May 13, 1993, defense counsel knew that the Plaintiffs had stated that they considered it a duty to file complaints with the state boards of public accountancy in Mississippi and Louisiana, (Ex. "A"). He chose, however, not to mention on May 13, 1993 any waiver of such rights.

In their "Response to Defense Motion to Enforce Settlement Agreement", August 27, 1993, Plaintiffs explained that the wording of defense counsel's draft would obviously preclude the exercise of those rights. Defense counsel deemed their claim to be "without merit and frivolous", ("Opinion and Order", p.5); declared that Plaintiffs deserved sanctions for "recalcitrance", and then ironically included the specific conditions of waiver of rights in his "Opinion and Order",(pp.5-6).

VIII. Plaintiffs believe that continuing tactics such as the defense counsel's entirely improper "Motion for Sanctions", are aimed at diversion and delay, in the hope that the mounting expenses of the Plaintiffs in prosecuting this case will somehow dissuade them, or that somehow the issues of the defendant's grossly negligent accounting performance and his willful disregard for the executrix's rights as his client will be obscured. Plaintiffs respectfully submit that the above conditions, (I. through VIII), are not the proper means by which a defense should attempt to settle a well-founded lawsuit, nor are they at all in accordance with the Rules of Professional Conduct for attorneys in our State.

The present call for sanctions and attempt to enlist the aid of this court in the abrogation of the rights afforded the appellants according to Rule 10, Mississippi Supreme Court Rules, is viewed by Plaintiffs as a matter to be summarily denied by this court. In fact, an objective and independent examination of the history of this case will show that while the Plaintiffs have never been guilty of any sanctionable action, quite the opposite is true with respect to the conduct of the defense counsel, Richard D. Gamblin. The following is an incomplete but illustrative list of improper and indeed sanctionable actions taken by defense counsel throughout the history of this lawsuit. The list includes instances of violations of the Rules of Professional Conduct.

1. The letter of December 12, 1984, (Ex."B"), which is a part of the record now, shows unequivocally that the executrix informed the defendant that the estate had suffered damages due to his accounting error, and requests his assistance. This letter shows that the core of the defense is not only frivolous but fraudulent. The defense counsel has persistently urged the following defenses, all of which are refuted by this one letter:

i. The claim that the defendant was never tendered the defense, (see defendant's "Brief for Appellees" to the Supreme Court, p.16). Defense counsel then built upon this utterly false assertion by citing cases in which there was no tendering of the defense, (defendant's "Brief for Appellees" to the Supreme Court, p.19).

ii. The claim that the estate was not damaged proximately by the accounting error of the defendant.

iii. The claim that the executrix was never under any legal compulsion to pay the heirs the (mitigated) amount of $15,000.00. This ludicrous claim was asserted despite the fact that the executrix was forthwith sued by the heirs, and ordered by the court to pay $30,956.00, after the defendant advised her to withhold "about $30,000.00" to compensate for the tax liability which was negligently omitted from an accounting schedule prepared by the defendant, and which served as the foundation of a compromise agreement between the heirs and the estate. Apparently, the defense counsel does not deem a court order "legal compulsion".

The lack of any response to the letter of December 12, 1984, or to Plaintiffs' later efforts in May of 1985 to enlist the defendant's assistance establishes the defendant's willful disregard for the rights of his client, the

executrix, and a refusal to take responsibility for his work and actions, when the impending damages were not only foreseeable, but inevitable without his assistance. Finally, this letter proves that the Plaintiffs were reluctant to sue the defendant, and in fact willing to absorb a prior loss of $5,533.10 (due to the defendant's late preparation of a primary tax return), + $10,250.00 estimated continuing legal costs because of the lawsuit proximately caused by the defendant's accounting errors and refusal to assist his client in any form or fashion.

This letter was especially called to the attention of defense counsel Richard D. Gamblin on November 7, 1985 when the first deposition of Plaintiffs was taken. This letter is a matter of record, and yet the very core of the defense depends upon the nonexistence of every fact it sets forth. There can be little question as to why the defense counsel would like to have this letter, and several other key documents which appellants have listed in their "Designation of the Record" stricken.

Continuing the list of improper defense claims:

2. That the payment of the $15,000.00 lawsuit settlement was voluntary.

3. That the $15,000.00 payment was made to "buy insurance" against windfall profit tax liability, with absolutely no corroborating evidence offered in support.

4. That the reason for Plaintiffs' payment of $15,000.00 to the heirs in settlement of a lawsuit is "obscure", when the documented accounting omission, lawsuit, court order, and settlement make this obvious to any lay person, not to mention to a skilled attorney.

5. That "the estate must establish liability for windfall profit taxes" in order to recover damages. This claim is blatant, because the Plaintiffs have purposefully established in the record, on October 27, 1987, that they would never claim anything against the defendant for erroneously instructing the executrix to pay the I.R.S. over $50,000.00 windfall profit tax liability, since she and her attorney fortunately decided not to follow his advice.

6. That there is "no connection" between the defendant's accounting errors and the $15,000.00 payment made by the Plaintiffs to the heirs in settlement of a lawsuit against the estate.

7. That the "heirs got all the oil money, so there was no loss to the Plaintiffs". Defense counsel knew at the outset of this case that the $15,000.00 came from the Plaintiffs' personal funds.

8. That the $15,000.00 payment to the heirs was just part of a "negotiated settlement" which was separate from the defendant's accounting errors.

9. That a "certain $4,500.00 should be deducted from any damages against the estate", an amount given to the executrix by the heirs for extra accounting and legal fees prior to their suit against the estate.

10. That there are insufficient legal grounds for punitive damages against the defendant.

11. That a law firm prepared a lawsuit based upon the executrix's undue influence upon the testatrix.

12. That a certain $4,826.00 should be deducted from any damages against the estate, (no relevance whatsoever to damages claimed).

13. That Mrs. Wirtz used undue influence against Lena Whitley and misrepresented her will and testament.

14. That the First Baptist Church of Natchez, MS considered litigation against Mrs. Wirtz, (despite the fact that the Pastor and Secretary deny any knowledge of this alleged activity).

15. That Judge David Bramlette has information which is relevant to this lawsuit. (Judge David Bramlette was subpoenaed by defense counsel to testify, and gave a deposition).

16. That defendant's performance and conduct meets the standards for his profession in Mississippi and there is no cause to doubt his expertise in the area of windfall profit taxes.

17. That the defendant did not know he was the accountant for the estate in early 1983.

18. That the defendant did not know that he was to produce an accounting to be used as a basis for settlement of the "oil portion" of the estate.

19. That it was unnecessary for the defendant to put any notes of exception on this accounting or to warn his client that she should not use his accounting in any particular way.

20. That the executrix's attorney, F.A. Johnson knew of and approved the violations of confidentiality which the defendant, Dennis R. Switzer was committing daily with the highly adversarial attorney for the oil heirs.

21. That the $4,826.00 mentioned in "12" above does not represent an accounting failure by the defendant.

22. That the "schedule" is "not an accounting".

23. That there was nothing improper about the defendant and the heir's attorney conversing on a daily basis.

24. That it was "O.K." for the defendant to assign $56,343.00 windfall profit tax liability to the estate.

The following false representations appear in the defense counsel's "Brief for Appellee's" to the Supreme Court of Mississippi and "Petition for Rehearing" submitted before the Supreme Court of Mississippi.

"That it does not matter whether" :

A. The defendant was the accountant for the estate.
B. The defendant was assigned to produce an "accounting" for distributing oil properties to heirs.
C. The defendant did in fact prepare an accounting entitled "Net Oil Income Attributable to Beneficiaries".
D. The defendant placed no note of exception on the document nor warned the executrix or her attorney by any other means, that the document was not fit for the use to which the assignment itself, and the title of the document indicated it was to be put.
E. The document clearly indicated that $22,937.00 windfall profit tax liability was to be withheld and paid to the I.R.S., but this figure was understated by some thirty thousand dollars; thus, promising the beneficiaries this much more, tax-free.
F. The direct result of this error was that the executrix was sued for this amount on grounds of breach of contract, plus punitive damages (basis: fraud); and costs.
G. The executrix lost this lawsuit and was ordered to pay $30,956.00.
H. This $30,956.00 would necessarily be paid from the personal funds of the executrix's family.
I. The executrix in fact negotiated and compromised with the beneficiaries, to reach an agreed-upon settlement of the lawsuit for the amount of $15,000.00.
J. The final court document in this cause (#32,406) is an order for the executrix to pay $15,000.00 to the beneficiaries, and this was in fact, done.

The defense counsel has attempted to explain away or divert attention from each of these facts, either by denying them outright in the face of conflicting evidence, or by claiming that "since the estate had no windfall profit tax liability" it was not damaged by the defendant's accounting errors. The defense tactic has been to mislead the court into thinking that the original complaint, and Plaintiffs' subsequent testimony and documentation made an attempt to show that the defendant had

damaged them by his assignment of windfall profit tax liability to the estate.

While it readily can be shown that the defendant did in fact erroneously assign such liability in the amount of $22,937. + $33,406 = $56,343; the executrix and her attorney came to believe that the defendant was in error in making this assignment, (letter, F.A. Johnson to David Bramlette on April 11, 1984), and were able to avoid the devastation that such an actual payment to the I.R.S. would have caused the estate and its heirs; i.e., they prevented any actual windfall profit tax liability.

This they did by not paying the I.R.S. what the defendant had indicated on two tax returns that the executrix should pay; and then by simply persuading the heirs to take all the oil money **and** the responsibility for whatever tax liabilities there might be. Because of this, the Plaintiffs did not in their original complaint nor at any time since, make any claim against the defendant based upon his culpability in the imposition or assignment of windfall profit tax liability upon the estate.

In fact, they clearly addressed this error or pretense, as the case may be, on the part of the defense counsel at a hearing on October 27, 1987 in Vicksburg, Mississippi, Warren County; by explicitly stating that they were not making, and never would make any claim against the defendant because of windfall profit tax liability. They even stated that if in the future the I.R.S. claimed $100,000.00 windfall profit tax liability against the executrix, no claim would be made against the defendant.

The defense tactic was successful at the trial court level, when the trial court directed a verdict for the defendant primarily on the basis that Plaintiffs had not proven the defendant culpable regarding windfall profit tax liability, despite the fact that the Plaintiffs never based their claim for accounting malpractice on this element, and in fact explicitly stated to the court that this was not a part of their claim.

On appeal to the Supreme Court of Mississippi, however, the Court ruled in favor of the Plaintiffs, and did not so much as mention the windfall profit tax liability strategy of the defense.

When the defense petitioned for a rehearing on the basis that "Plaintiffs had not proven that there was any windfall profit tax liability", the Supreme Court dismissed the argument without comment.

RESPONSE TO DEFENDANT'S ARGUMENT FOR SANCTIONS AGAINST PLAINTIFFS

In the "Opinion and Order" there are a number of omissions of salient facts, and several false assertions. These will be addressed in detail

in the forthcoming appeal but there are certain highly misleading indications which relate to this current "Motion", and require the following discussion:

1. On page 1, it is stated that "the court has reviewed the court file". On page 4, it is stated that "the court was first informed about the Plaintiffs' intention to pursue other complaints or proceedings against Switzer on August 30, 1993 at the hearing on Switzer's "Motion". Defense counsel and defendant have known for years that such complaints were a distinct possibility, and (Ex."A") shows one of several prior indications in the record that Plaintiffs considered it their duty to file complaints unless the defendant made reasonable restitution.

Plaintiffs respectfully submit that attorneys and judges involved in a malpractice suit against a CPA should expect that Plaintiffs may at some point wish to exercise their right to submit complaints and evidence to the state boards of public accountancy in the states wherein the CPA is licensed to practice.

Ordinarily, of course, such a complaint would not be submitted until litigation is concluded, since the board naturally might take the outcome of the litigation into consideration.

Plaintiffs would respectfully inquire as to whether this court has jurisdiction or authority to deprive any client or former client of a CPA, of the right to ask a state board of public accountancy to conduct an investigation.

2. Defense counsel chose not to mention the waiver of such rights at the discussions among attorneys and judge on May 13, 1993. Plaintiffs' position is that as the "buyer" of such a waiver, the defendant/defense counsel had the responsibility to inform the court and the Plaintiffs' attorneys that he wanted this term to be part of the settlement. Plaintiffs, and their attorneys on May 13, 1993 and presently, believe that no obligation exists for them to sacrifice these rights, particularly since they did not instigate or encourage the discussions of May 13, 1993, and had no intention to waive those rights.

ANSWER TO DEFENDANT'S MOTION FOR SANCTIONS, (POINT-BY-POINT)

Defendant's Preamble: Plaintiffs deny any "failure to comply" with Rule 10 and can find no specific description of any such failure in this entire motion.

Section (1): Admitted.

Section (2): Admitted.

Section (3): Plaintiffs deny any "total, willful, and flagrant disregard" of Rule 10 and can find no specific descriptive example of such. At best, Plaintiffs believe that such a claim must arise from misapprehension.

Section (4): In this section, defense counsel says the appeal is only from the "Opinion and Order", and that same is concerned primarily with a "narrow dispute". Based upon this false assertion, the defense counsel claims that Plaintiffs are designating more documents than are necessary, in his opinion; and therefore the Plaintiffs deserve sanctions. The fallacies in this argument are as follows:

(A) Even if Plaintiffs designated documents not needed in support of the issues which they have identified for the purposes of appeal, this is not a violation of Rule 10. While Plaintiffs are "encouraged to include in the record on appeal only those matters material to the issues on appeal", it is the **appellant** who must decide, (see Mississippi Supreme Court Rule 10, comments).

(B) On pp. 1-2 of the "Opinion and Order" defense counsel says that "on September 4, 1991 the Supreme Court remanded for a new trial". He omits that on October 23, 1991 the Court denied the defendant's petition for rehearing without comment, and on November 4, 1991, the Court mandated a new trial. There has been neither a trial nor a settlement, partial or otherwise.

Thus, as Plaintiffs stated in their "Statement of the Issues", the matters before the court as of November 4, 1991 remain entirely unresolved. The defense has persisted in frivolously alleging impropriety on the part of the Plaintiffs, and now that the issue has been raised, the Plaintiffs welcome an examination of the conduct of both the Plaintiffs and the Defense throughout the history of this case. Therefore, Plaintiffs reserve the right to address the issues on appeal raised by this frivolous claim for sanctions urged by the defense, and further reserve the right to call for an examination of the conduct of the defense counsel, Richard D. Gamblin.

(C) On p.2 of the "Opinion and Order", defense counsel says that the new trial was to be on "an issue" identified in the Supreme Court's

"Opinion", rendered on November 4, 1991. That issue is not narrow, limited to the $15,000.00 compensatory damages as he has indicated, but quite broad, because it is, in fact, undeniably the entire matter of the quality of the defendant's accounting for the oil moneys of the estate, and any and all damages and misconduct associated therewith.

(D) The idea that appellants deserve sanctions and should pay defense counsel for the defense taking this improper, diversionary action against them because in his opinion they have designated issues and documents not necessary to their appeal is difficult to assimilate.

If issues and supporting documents are to be designated by the appellees in a lawsuit, then the right to an appeal has a very hollow meaning for the appellants. Mississippi Supreme Court Rule 10 does not remotely suggest that it was intended to serve the defense counsel's purpose.

The references to a "May 13, 1993 settlement agreement" are without substance (see preceding sections I - VIII for a series of reasons as to why there is no settlement, but only continuing controversy).

On p.3 of the "Motion", defense counsel says that of the 36 items listed on the "Designation of the Record", "many are not part of the record". Plaintiffs denoted only (5) items not presently filed and a part of the record. Three are to be affidavits attached to the forthcoming "Statement of the Evidence", one item will be certain memoranda, and the remaining item is an exhibit of bills and canceled checks in support of Plaintiffs' claim for damages.

On p.3 defense counsel asserts that "practically all of them are not necessary for appeal". Again, according to Rule 10 it is the **appellant** who must decide that issue. This is a mature case and the defense has engendered a great number of documents by continuing to delay justice. Plaintiffs have no intention of forwarding any irrelevant material, but naturally want to exercise fully their right of appeal.

Section (5): In this section, defense counsel makes it clear that the appellant's "Statement of the Issues" covers much more than he would like to see. He takes no specific exception to anything included nor tries to show how it might be in violation of Rule 10 and deserving of sanctions, but suddenly declares that it is "unmistakably clear" that appellants are raising issues which he asserts were "finally and fully settled and compromised". For the reasons why this statement is entirely fallacious, see preceding sections I-VIII.

Section (6): Plaintiffs respectfully submit to this court the following:

(A) While Plaintiffs find the defendant's "Motion for Sanctions" to be of such substance and quality as to warrant its summary denial and dismissal in its entirety by this court, Plaintiffs have diligently tried to fairly study its content and to respond in a thorough manner so that the court may make a proper decision.

(B) Plaintiffs have been unable to find a single valid argument for sanctions and believe that the defense counsel is improperly attempting to violate Rule 10 by enlisting the involvement of the court in the abrogation of rights which this rule gives parties desiring to effect an appeal.

This motion certainly raises a question as to why the defense so diligently seeks to prevent information going to the Mississippi Supreme Court and the State Boards of Public Accountancy. If an "unnecessary" document should be designated, why should it prejudice the defense? Certainly, Plaintiffs will not object to any documents the defendant may wish to send, including a certain document which the defense was given an opportunity to expunge in June, 1993.

RESPONSE TO DEFENSE COUNSEL'S LETTER OF FEBRUARY 4, 1994

This letter is typical of previous, unfounded, accusatorial assertions filed on behalf of the defense throughout the history of the case; in that, it charges the Plaintiffs with "highly improper" conduct, and yet cites absolutely no authority for such a claim. In this letter the defense counsel asks this court to "admonish the Plaintiffs to cease immediately any further communications of this nature". The communication which the defense counsel refers to is a letter from the Plaintiffs to an insurance company which has been involved in this case. The fact that the defense counsel is asking this court to prohibit the Plaintiffs from offering to give information about this case to another party connected with this case speaks volumes, both about defense counsel's misapprehension of the Rules of Professional Conduct, and about his desire to prohibit any and all information concerning this case from being brought to the attention of third parties; whether it be the Supreme Court, the state boards of public accountancy, an affected insurance company, or the public at large.

Rule 4.2, "Communication with Person Represented by Counsel", Mississippi Rules of Professional Conduct, states:

> In representing a client, a **lawyer** shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The comments specifically state:

> "Also, **parties** to a matter may communicate directly with each other".

Furthermore, as defense counsel and the court are well aware, the Plaintiffs in this case are representing themselves in proper person, and therefore the Rule is wholly inapplicable to them. This Rule is obviously designed to prohibit a lawyer from taking advantage of a party by whatever means by communicating directly with that party, when that party is represented by counsel.

In fact, this Rule, as made clear in the comments, is not at all designed to prohibit parties from communicating directly with each other, whether they are represented by counsel or not. This conclusion is entirely at odds with the statutory and judicial principle of encouraging settlements of lawsuits. That defense counsel would like this court to admonish the Plaintiffs for offering to provide information about this case to interested parties is not surprising; however, that defense counsel would claim that the Plaintiffs' actions are improper according to the Rules of Professional Conduct is both ironic and outrageous.

Additionally, the Plaintiffs call to the attention of this court, that while the defense counsel's allegations of impropriety against the Plaintiffs are groundless, the defense counsel's conduct raises serious questions. The Plaintiffs question whether or not it is proper for an attorney who is copied with a communication sent by a party to the opposing party, to then forward this communication to the judge, and then by letter advance an argument regarding the merits of his pending motion. At the very least, the February 4, 1994 letter sent by defense counsel Richard D. Gamblin to this court, addressed to the trial court judge, places the judge in the precarious position of possibly violating section A.(4), Canon 3, Mississippi Code of Judicial Conduct, which states:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to the law, and, except as authorized by law, neither initiate nor consider ex parte or other communication concerning a pending or impending proceeding . . .

Plaintiffs hereby state that they will desire to add to the "Designation of the Record"; the defendant's "Motion for Sanctions, the Plaintiffs' "Response to Defendant's Motion for Sanctions", the transcript of any hearing held in connection with this motion, and any ensuing adjudication.

As Plaintiffs proceed to perfect their appeal, and as covered in their "Designation of the Record", they will expand the record via their "Statement of the Evidence", regarding certain unrecorded court events.

In the "Designation of the Record" there are most likely some documents which the Plaintiffs will eliminate as they begin preparation for their appeal. Obviously, the Plaintiffs desire to avoid the cost of designating unnecessary documents.

Plaintiffs respectfully submit that this affair should have ended in December, 1984 without any litigation. The letter of December 12, 1984 from the executrix to the defendant speaks for itself (Plaintiffs' "Response to Defendant's Motion to Enforce Settlement Agreement", August 27, 1993, Ex. "A").

WHEREFORE, Plaintiffs respectfully ask this court not to interfere with their right to an appeal, and to deny the defendant's "Motion for Sanctions", with costs being assessed to the defendant for bringing this frivolous motion before this court and subjecting the Plaintiffs to further unnecessary delays, and expenditures of money and time. Furthermore, Plaintiffs ask that this court not attempt to exercise jurisdiction over them in so far as their first amendment rights to convey information about this case are concerned.

Respectfully submitted,

"s / Charlena Wirtz" "s / Lynn Wirtz"

"s / D. Clay Wirtz" "s / Andrew Wirtz"

CERTIFICATE OF SERVICE . . .

APPENDIX "P"
SEPTEMBER 20, 1993

Received and Filed Sep 27, 1994
Fred Ferguson, Circuit Clerk
"s / _____"

Honorable Richard T. Watson
Judge, Sixth Circuit Court
P.O. Box 1384
Natchez, MS 39120

Re: # 5701 (Wirtz v. Switzer)
Letter, R. D. Gamblin to Hon.
R. T. Watson 9/15/93

Dear Judge Watson:

1. At 9:10 - 9:22 this morning* I received from Mr. C.G. Holt, verbal notification and fax of Mr. R.D. Gamblin's letter to you , and attachments for your signature. * 9/20

2. Mr. Gamblin's letter is dated last Wed. Sept. 15 and Mr. Holt informs me that he first saw it this morning (previous urgent communications between attorneys have been hand-delivered or faxed).

3. It is Plaintiffs' belief that you have before you sufficient information to make your decision; however, we respectfully request that we be allowed to call your attention to a few facts which we can document and which we feel should bear upon your judgment:

(A) Mr. R.D. Gamblin has known for years that our position is that we have ample grounds for complaint against his client, to the Mississippi and Louisiana State Boards of Public Accountancy.

(B) On last May 13, Plaintiffs reported for trial but were placed in a room and told that they had two choices: (1) accept $ 18,000 in lieu of trial/further litigation, or: (2) face a directed verdict in favor of the defendant.

The grounds, as explained by our attorneys, were that the court had decided that our expert testimony from the first trial was inadmissible and that the expert testimony we were about to present would be inadequate.

We were told in answer to our questions to our attorneys, that Mr. Gamblin had not been properly noticed regarding the first expert's

testimony and that he was therefore being given his choice of Plaintiff's experts, and had been told that if he chose the second witness, he would receive a directed verdict.

(C) Regarding that second expert's testimony, Plaintiffs had planned to have the expert only provide background as to structure/function/duties to public, of the state board of public accountancy; and to explain why the board has rules, and to read certain of those rules to the jury.

Plaintiffs (sans expert) would then show in detail how the defendant broke those certain rules / codes of conduct.

(D) However, being given only alternatives (1) and (2) under (B) above, Plaintiffs very reluctantly and with great monetary loss submitted to alternative #(1), on May 13, 1993.

(E) But, before doing so, Plaintiffs made very sure with their attorneys that neither Mr. Gamblin nor the court was asking them to give up any other rights or make any other concessions.

Plaintiffs mentioned specifically their rights to ask the Mississippi and Louisiana State Boards of Public Accountancy to investigate the defendant's accounting performance and professional conduct.

They were assured that these were not at risk, as they had not been mentioned by Mr. Gamblin.

Nor did Plaintiffs' attorneys suggest in the slightest, that Plaintiffs had any duty to offer up those rights as negotiable items, or to voluntarily forfeit them.

(F) When Plaintiffs' attorneys were first hired, and numerous times since, it can documented that they were told that one of the Plaintiffs' primary concerns was Plaintiffs' duty to the Miss. & La.. State Boards of Public Accountancy in an effort to assist these bodies in maintaining standards of performance and professional conduct for CPA's in these states.

(G) It is Plaintiffs' position that it was the defense (the "buyer") which had responsibility to mention/discuss/verify what it was buying. Plaintiffs did not and do not wish to sell or give away those rights, and both state boards have strongly encouraged us to exercise them.

Plaintiffs certainly never made any secret of the fact that if the defense did not make reasonable restitution, these rights would be

exercised. References to this are in the court records, and explicit information was at various times give to Mr. Gamblin, in writing.

(H) Shortly after the May 13, negotiations (at which the actual Plaintiffs were denied permission to speak, or to hear the discussions) Plaintiffs told their attorneys that Mr. Gamblin would undoubtedly word the release in such a way as to attempt to preclude the exercise of their rights, which he had chosen not to mention on May 13.

Plaintiffs also stressed to their attorneys that they would not sign such a document.

(I) Nevertheless, when they* read Mr. Gamblin's document they told him they had no problem with it. * Messrs Holt & Rogers.

Plaintiffs took strong exception to this act on the part of their attorneys, since it was without their approval, directly contrary to their expressed desires and intentions; and highly detrimental to their standing with the court, and their case in general.

(J) Plaintiffs attorneys have repeatedly insisted that we should just sign Mr. Gamblin's release; that it wouldn't preclude the exercise of our right to ask the State Boards to investigate, nor impede their progress in doing so.

Messrs. Holt, Rogers, and Gamblin have stressed that we would not follow this advice, and this is true.

(K) Plaintiffs knew by common sense as well as experience that we were being given bad advice. The executive director of the Mississippi State Board of Public Accountancy has now in effect verified that it was.

Even after being informed of this, Mr. Holt insisted we sign Mr. Gamblin's original, unabridged "full, complete, absolute release" with its obvious design to preclude a complaint to the State Boards.

(L) Even more incredibly; today, after reading Mr. Gamblin's "Opinion and Order" which would "include the Plaintiffs' relinquishment of their right to pursue complaints against Switzer with the Mississippi and the Louisiana State Boards of Public Accountancy"; Mr. Holt told me that the document "looks O.K. to him, he has no problem with it".

These are the same rights we hired Messrs. Holt and Rogers to help us preserve and which they have insisted we need not fear were in jeopardy.

(M) In his proposed "Opinion and Order" Mr. Gamblin praises our attorneys. This does not surprise us.

(N) On August 18 the defense filed a motion to enforce Plaintiffs to sign an "appropriate release", meaning in this case Mr. Gamblin's unabridged version.

Plaintiffs filed on August 27 a clear explanation as to why they would not agree to that; i.e., the proposed version did not represent what they had agreed to, and it would preclude the exercise of their right to have the defendant's performance and professional conduct investigated.

(O) At a hearing on August 30, however, Mr. Gamblin and the court stated that they did not understand the Plaintiffs' position.

Plaintiff Lynn Wirtz requested through counsel that he be allowed to take the stand and explain, but permission was denied.

(P) Plaintiffs' explanation of their position, filed as "Plaintiffs' Response to Defendant's Motion to Enforce Settlement" on Aug 27 was indeed formulated by the Plaintiffs, and not their attorneys.

Their attorneys never submitted a proposed response for Plaintiffs' review. With time running out for filing, on August 26, Plaintiff Lynn Wirtz faxed a draft to Mr. Holt. On August 27, Lynn Wirtz pursued the matter all day until the response was finally faxed (without exhibits referenced or attached) to Ms. Micki Smith, Court Administrator; exactly thirteen minutes before the deadline of 4:45 p 8/27.

This response speaks for itself. It is based upon proper cause and was rendered in full good faith. It is hardly "frivolous and without merit".

(Q) As regards payment of jurors by the Plaintiffs, let it only be said that on May 13, Plaintiffs followed the court's order and reported for trial.

They can see no way that they should be held responsible for the abortion of that trial.

(R) This day*, Mr. Holt stated that during the negotiations of May 13, it was never Plaintiffs' attorneys' understanding/impression/feeling that our rights re the State Boards were in any way at risk. *9/20/93

Nor did these attorneys perceive any such risk should we sign Mr. Gamblin's unabridged version of what we agreed to, nor do they "have any problem" with his current demand which specifically forbids the exercise of those rights.

On May 13, we did not agree to sign whatever Mr. Gamblin decided to write, and this is exactly what we are about to be ordered to do.

(S) We do not appreciate or accept being depicted by our own attorneys as stubborn, unreasonable people. The facts totally refute such a portrayal.

We have submitted to being denied a trial of Mr. Switzer "at the last moment"; no award for punitive damages; no award for nine years mental duress; and approximately fifty thousand dollars out-of-pocket loss even if Mr. Gamblin decides to pay us the $ 18,000 he agreed to on May 13.

We originally asked only for reimbursement of the $ 15,000 Mr. Switzer's failures caused us to pay, and were willing to absorb another $ 15,000 damages at that time (Dec 1984) (Ref.: "Response --- 8/27/93 Ex. (A)).

"s / Lynn Wirtz / Charlena Wirtz"

CERTIFICATE OF SERVICE . . .

APPENDIX "Q"

MEMO OF JUNE 4, 1993 FROM LYNN WIRTZ TO C.G. HOLT

Fax (6 p.) 601 353 0126 6/4/93

Mr. Chris Holt
Mr. Guy Rogers

Re: R.D. Gamblin's Draft of Settlement Agreement (5/27/93)

In the interest of finalizing case 5701, as we agreed to do in exchange for $18,000, our response follows:

(1) We have carefully reviewed the draft and find that it is simply much too lengthy, redundant, and all-inclusive; with too many indefinite boundaries.

We simply agreed to end our litigation under civil action # 5701 for $ 18,000 and that is all that needs to be said.

As you are well aware, we emphatically and repeatedly made sure that you and we understood that nothing else whatsoever was in the bargain. And we accepted your assurance that nothing else was so much as mentioned during the discussions which were taking place just minutes before Dennis Switzer was to be tried at 9:00 A May 13, 1993.

We had specifically requested that we be allowed to participate in these discussions once they had begun, but the judge denied our request.

(2) We were given an ultimatum that we would either accept $ 18,000 or that our case would be dismissed via a directed verdict in favor of Switzer. We were told that the Supreme Court would affirm.

This $ 18,000 was in lieu of: our documented out-of-pocket costs of $ 49,616.88 plus an extremely truncated interest-loss of $ 16,400. There was complete forfeiture of any compensation for nine years mental duress, deprivation of family time, or any punitive damages.

There is nothing resembling justice or equity in any of this. Any qualified jurist can quickly see the facts and merits of our case against Dennis Switzer (Ref. Plaintiffs Motion / Brief for Partial Summary Judgment, 7/13/92). I have just verified the presence of this document in the Circuit Court file, on this day.

In fact, one needs only to look at the following documents:

(A) Settlement Agreement with Switzer's accounting attached (1/3/84).

(B) Lawsuit against the executrix (now Plaintiff) (2/22/84) (Cause # 32,406).

(C) Chancery Court order to pay $ 30,956 (Cause # 32,406) (3/23/84).

(D) Chancery Court order to pay $ 15,000 (Cause # 32,406) (6/19/84).

(E) Letter, Charlena Wirtz (Executrix) to D.R. Switzer 12/12/84 (Presented to R.D. Gamblin 11/7/85; establishes tender of defense, willingness to absorb significant losses, reluctance to sue) **Att.**

However; we agreed under the conditions with which we were confronted, to drop our lawsuit. We will abide by that, but nothing more.

(3) The information in (2) above is listed for the record; and to elucidate as to why we will not sign any draft which indicates that Dennis Switzer was the victim of a frivolous or unfair lawsuit. The wording which has the defendant telling us how we must construe his payment of $ 18,000 must be deleted.

(4) The tactics used by Switzer throughout this affair are literally beyond belief. This would be a "separate issue", but for one thing:

As you are well aware, we were, prior to the "negotiation discussions" of 8:15 - 9:00 A 5/13 given every reason to believe that Mrs. Wirtz was going to be accused of fraud, at Switzer's trial.

Libelous and slanderous as these charges (of undue influence against our dear friend Lena Whitley) were; irrelevant though they were; void though they were through the passage of time *; we were clearly being threatened with the rendition of this diversionary and prejudicial material before a jury. * (Deadline for any will contest was 1/5/84).

(5) Which brings us to the matter of a certain deposition which was taken on Switzer's behalf and with the encouragement of the court.

We were told that this deposition was to cover a certain $ 4,500 and a certain $ 4,826 with the intent being to somehow convince the court that Switzer should be credited with these against any damage to the Plaintiffs. You are familiar with these amounts and their derivation and you know that in truth they actually represent two additional errors by Switzer but which were never part of our lawsuit and are therefore of no relevance.

However, the deposition, which is a "study" in itself, was aimed at projecting the idea that Mrs. Wirtz may have committed fraud concerning Mrs. Whitley's will.

There are several grave improprieties embodied in this deposition and the circumstances surrounding it, including violations of confidentiality.

We see nothing short of a full apology and retraction being able to rectify this particular affair. The existence of this deposition represents a continuation of case 5701, which we must confront.

(6) We stand ready to do what we said we would do. The agreement can be one simple paragraph. It must confine itself to the cessation of civil case 5701. It need not reiterate (seven times) the names of all five plaintiffs.

The considerations under (1)-(5) above must be resolved.

We also require that wording be included so that "all men may know ---" the true reasons we compromised our case just before trial was to begin.

(7) We instruct you to forward this in its entirety to R.D. Gamblin, & you may copy anyone you wish.

Thanks,

"s / Lynn Wirtz, Charlena Wirtz" 6/4/93

APPENDIX "R"

RECEIVED AND FILED DEC 7 1993
FRED FERGUSON, CIRCUIT CLERK
BY "s / _____"

IN THE CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ — **PLAINTIFFS**

VS. **CIVIL ACTION NO. 5701**

DENNIS R. SWITZER AND DENNIS R. SWITZER, CPA, LTD. — **DEFENDANTS**

OPINION AND ORDER ON MOTION OF DEFENDANTS TO ENFORCE SETTLEMENT AGREEMENT

This civil action is before the Court on the Motion of Defendants to Enforce Settlement Agreement, which was filed on August 19, 1993. The Plaintiffs submitted a response to this motion on August 27, 1993, and copies of the exhibits to that response were provided to the Court shortly prior to the hearing on August 30, 1993. The Plaintiffs' response and the exhibits thereto have been filed with the Circuit Clerk of Adams County. The Court conducted a hearing on this motion on August 30, 1993 at the Franklin County Courthouse in Meadville, Mississippi, and, following oral argument, the Court took the motion under advisement. The Court has reviewed the court file and has considered the arguments of counsel for the parties and makes the following findings:

This civil action was filed on June 19, 1985. It was tried on November 4 and 5, 1987, and a Final Judgment was entered on November 13, 1987. The Plaintiffs thereafter appealed to the Supreme Court of Mississippi. On September 4, 1991, the Supreme Court affirmed in part and reversed and remanded for a new trial on an issue identified in the opinion. See 586 So.2d 775.

On March 15, 1993, the Defendants moved to dismiss for failure of the Plaintiffs to prosecute. That motion was heard by the Court on

March 29, 1993. The Court denied the motion and set this case for trial on May 13, 1993. However, the Court ordered that, if this case were not tried on May 13, 1993 for any reason attributable to the Plaintiffs, it would at such time dismiss this action with prejudice. An appropriate order was entered on April 7, 1993.

On May 13, 1993, prior to the commencement of trial, the parties participated in a settlement conference with the Court. Following this conference, the parties agreed to settle all remaining claims of the Plaintiffs for $ 18,000. The parties advised the Court that this settlement agreement had been reached, and the jurors who had been summoned for jury service and who were awaiting commencement of the trial were thereafter dismissed by the Court.

On May 21, 1993 Switzer's attorney forwarded to the Plaintiffs' attorneys a proposed final judgment of dismissal with prejudice and a proposed release. Copies of these documents are attached to this order as Exhibit A and Exhibit B, respectively. Switzer's attorney obtained the settlement check shortly thereafter and promptly informed the Plaintiffs' attorneys that he had received it and that it would be delivered upon the Plaintiffs' execution of an appropriate release.

Switzer's attorney and the Plaintiffs' attorneys communicated frequently during the period from May 1993 through August 1993 about the proposed settlement documents. Efforts to conclude the settlement were unsuccessful, and Switzer filed the Motion to Enforce the Settlement Agreement on August 19, 1993. When the motion was filed, Switzer's attorney simultaneously mailed to the Court a copy of the proposed final judgment and the proposed final release that he submitted to the Plaintiffs' attorneys in May 1993 (Exhibit A and Exhibit B). The Court examined these documents prior to the hearing on Switzer's motion. The Court participated in the settlement conference on May 13, 1993 and is of the opinion that these documents prepared by Switzer's attorney fairly and accurately reflect the settlement agreement that was reached on that date.

At the hearing, the Plaintiff's attorneys informed the Court that the Plaintiffs declined to execute the proposed release because, in their opinion, the release could be construed to preclude the Plaintiffs from instituting and prosecuting complaints against Switzer before the Mississippi and Louisiana State Boards of Public Accountancy. In response to the Court's inquiry, the Plaintiffs' attorneys stated that they had nevertheless advised the Plaintiffs to execute the release in the form proposed by Switzer's attorney. The Plaintiffs readily acknowledge that the May 13, 1993 settlement agreement covered all claims for damages arising in any way from the services performed by Switzer and his firm on

behalf of the Estate of Lena Watson Whitley. Thus, the only dispute that now exists between the parties is whether the May 13, 1993 settlement agreement included the Plaintiffs' relinquishment of the right to pursue complaints against Switzer before the Mississippi and Louisiana State Boards of Public Accountancy.

The Court finds that, on May 13, 1993, the parties to this action entered into a valid and binding settlement agreement. That settlement agreement was a full and complete settlement, which constituted a complete accord and satisfaction of all claims of the Plaintiffs against Switzer and his firm that arise in any way from the tax and accounting services rendered for the Estate of Lena Watson Whitley. The Plaintiffs did not attach any conditions to the settlement, nor did they except any type of claim, matter, or proceeding from the settlement agreement. The Court was first informed about the Plaintiffs' intention to pursue other complaints or proceedings against Switzer on August 30, 1993, at the hearing on Switzer's motion. The Plaintiffs did not at any time condition the May 13, 1993 settlement agreement upon their reservation of the right to pursue other proceedings, including complaints with or before the State Boards of Public Accountancy, against Switzer. In addition, the Plaintiffs did not specifically except such a right from the settlement agreement. For these reasons, the Court finds that the May 13, 1993 settlement agreement included the Plaintiffs' relinquishment of their right to pursue complaints against Switzer with the Mississippi and the Louisiana State Boards of Public Accountancy, and accordingly rules that the Plaintiffs are thereby precluded from instituting and pursuing any such complaints.

For all of the foregoing reasons, the Court is of the opinion that the settlement agreement of May 13, 1993 should be enforced by the Court, and that this action should be dismissed with prejudice.

At the hearing on Switzer's motion, the Court raised sua sponte the question of whether sanctions should be imposed against the Plaintiffs. The Court has reviewed the Plaintiffs' Response to Defendant's Motion to Enforce Settlement Agreement and finds that the bases for the Plaintiffs' opposition are without merit and frivolous. The Court has determined that the Plaintiffs Lynn Wirtz and Charlena Wirtz, and not their attorneys, are responsible to the content of this response. The Court has further determined that the Plaintiffs' attorneys advised the Plaintiffs to execute the release submitted to them by Switzer's attorney and that the Plaintiffs' refusal to do so was contrary to the advice of their attorneys. The Court notes that the current attorneys for the Plaintiffs, Christopher G. Holt and Guy N. Rogers, Jr., entered their appearance as attorneys for the Plaintiffs in March 1993, after this case had been pending for nearly eight years.

The Court is of the opinion that these attorneys have at all times ably and competently represented their clients in this action, under difficult circumstances.

At the hearing on Switzer's motion, the Court recessed after oral arguments of counsel, in order to allow Mr. Holt and Mr. Rogers again to confer with the Plaintiffs Lynn Wirtz and Charlena Wirtz about execution of the release. These Plaintiffs were present in the courtroom during the oral arguments, and they heard the comments of the Court concerning matters covered by the settlement agreement, may of which have been repeated in this order. Nevertheless, these Plaintiffs again refused to execute the release. Their continuing refusal to do so justifies action by this Court against the Plaintiffs Charlena Wirtz and Lynn Wirtz. The law is well settled that courts have inherent power to make and enforce such orders as are necessary to control their dockets and to deal with recalcitrant parties. Under the particular circumstances presented here, the Court has determined that the Plaintiffs Lynn Wirtz and Charlena Wirtz should be assessed with all costs incurred by Adams County with respect to the jurors summoned for service on May 13, 1993.

IT IS, THEREFORE, ORDERED AND ADJUDGED as follows:

1. This civil action is hereby dismissed with prejudice.
2. The parties shall bear their own costs.
3. The Defendants shall pay the sum of $ 18,000.00 into the registry of the Circuit Court of Adams County, Mississippi as soon as practicable. Such funds shall be placed in an interest-bearing account by the Circuit Clerk and shall remain there until further order of this Court.
4. The Plaintiffs may not institute, prosecute, or pursue any complaint or other proceeding of any kind against the Defendants or any successor firm with the Mississippi State Board of Public Accountancy or the Louisiana State Board of Public Accountancy.

SO ORDERED AND ADJUDGED, on this the 6th day of December, 1993.

"s / Richard T. Watson"
CIRCUIT JUDGE

(EXHIBIT "A")
(DRAFT)

IN THE CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI

CHARLENA WIRTZ, AS EXECUTRIX OF THE ESTATE OF LENA WATSON WHITLEY, CHARLENA WIRTZ, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, AND CLAY WIRTZ — **PLAINTIFFS**

VS. — **CIVIL ACTION NO. 5701**

DENNIS R. SWITZER AND DENNIS R. SWITZER, CPA, LTD. — **DEFENDANTS**

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE

The parties to this case having advised the Court that they have reached a settlement agreement and that all claims asserted herein have been fully compromised and settled; and the parties having jointly requested the Court to dismiss this civil action and all claims asserted herein with prejudice; and the court being of the opinion that this request should be granted:

IT IS, THEREFORE, ORDERED AND ADJUDGED this civil action and all claims asserted herein be, and they are hereby, dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that the parties shall bear their own costs.

SO ORDERED AND ADJUDGED, on this the _____ day of _____, 1993.

_____
CIRCUIT JUDGE

APPROVED AS TO FORM:

_____
GUY N. ROGERS, JR.
MSB #8391
ATTORNEYS FOR PLAINTIFFS

_____
CHRISTOPHER G. HOLT
MSB #9371

_____
RICHARD D. GAMBLIN MSB #4401
ATTORNEY FOR DEFENDANT

(DRAFT)

FULL, COMPLETE, ABSOLUTE RELEASE

KNOW ALL MEN BY THESE PRESENTS that we, the undersigned CHARLENA WIRTZ, individually and as Executrix of the Estate of Lena Watson Whitley, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, and CLAY WIRTZ, for and in consideration of the total sum of EIGHTEEN THOUSAND DOLLARS ($18,000.00), cash in hand paid for and on behalf of Dennis R. Switzer, Dennis R. Switzer, CPA, Ltd., and Switzer, Hopkins & Mange, the receipt and sufficiency of which is hereby acknowledged, do hereby release, acquit, and forever discharge DENNIS R. SWITZER, DENNIS R. SWITZER, CPA, LTD., and SWITZER, HOPKINS & MANGE, and all partners, officers, directors, employees, and agents thereof (hereinafter collectively referred to as the "Releasees") from any and all actions, proceedings, causes of action, claims, demands, losses, injuries, expenses, and damages of every type, kind and character, past present and future, which we have, have had, or might in the future have against the Releasees as a result of any and all accounting and tax services by Dennis R. Switzer, CPA, Ltd. for and on behalf of any and all beneficiaries under the Last Will and Testament of Lena Watson Whitley (hereinafter collectively referred to as "Switzer's services").

For and in consideration of the sum stipulated hereinabove, we, the undersigned CHARLENA WIRTZ, individually and as Executrix of the Estate of Lena Watson Whitley, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, and CLAY WIRTZ, accept said consideration as full payment, accord, and satisfaction of any and all claims against the Releasees arising in any way or manner from Switzer's services and in complete accord and satisfaction of all claims of every type, kind, and nature that we may have, may have had, or may have in the future, arising in any way or manner from Switzer's services; and we, the undersigned CHARLENA WIRTZ, individually and as Executrix of the Estate of Lena Watson Whitley, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, and CLAY WIRTZ, further agree that we will save and hold harmless the Releasees from any future claims, actions, suits, or other proceedings that may be made or filed which arise in any way or manner from Switzer's services; and we, the undersigned CHARLENA WIRTZ, individually and as Executrix of the Estate of Lena Watson Whitley, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, and

CLAY WIRTZ, further agree to reimburse the Releasees for any expenses, costs, or money that they, or any of them, might have to pay if any suit should be filed against the Releasees, or any of them, in any court of law or equity that seeks any further sum from the Releasees based upon claims allegedly arising in any way from Switzer's services.

The undersigned further covenant and understand that payment of the sum stipulated hereinabove is not to be construed in any way as an admission of liability in the premises by the Releasees or any of them, but rather that said amount is being paid solely in order to avoid further litigation, expenses, and costs and to but peace. Further, it is expressly understood and agreed that the acceptance of the dum stipulated hereinabove is in full accord and satisfaction of a disputed claim for actual or compensatory damages, punitive damages, and costs.

The undersigned CHARLENA WIRTZ, individually and as Executrix of the Estate of Lena Watson Whitley, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, and CLAY WIRTZ agree to dismiss or cause to be dismissed with prejudice as to all Defendants certain civil action now pending in the Circuit Court of Adams County, Mississippi styled, "Charlena Wirtz, as Executrix of the Estate of Lena Watson Whitley, Charlena Wirtz, Lynn Wirtz, Elizabeth Wirtz, Andrew Wirtz, and Clay Wirtz vs. Dennis R. Switzer and Dennis R. Switzer, CPA, Ltd.," being Civil Action No. 5701 on the docket of that court.

It is further understood and agreed that, if for any reason whatsoever it should develop or be determined that the release and discharge of the Releasees herein is in any manner defective or less than complete, then CHARLENA WIRTZ, individually and as Executrix of the Estate of Lena Watson Whitley, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, and CLAY WIRTZ will execute any and all instruments and do any and all things necessary to effectuate a full, final, and complete release.

WITNESS OUR SIGNATURES, on this the _____ day of _____, 1993.

_____
CHARLENA WIRTZ

_____
CHARLENA WIRTZ EXECUTRIX OF THE
ESTATE OF LENA WATSON WHITLEY

_____
LYNN WIRTZ

_____
ELIZABETH WIRTZ

_____
ANDREW WIRTZ

_____
CLAY WIRTZ

APPROVED AS TO FORM:

_____
GUY N. ROGERS, JR.

_____
CHRISTOPHER G. HOLT

ATTORNEYS FOR CHARLENA WIRTZ, individually and as Executrix of the Estate of Lena Watson Whitley, LYNN WIRTZ, ELIZABETH WIRTZ, ANDREW WIRTZ, and CLAY WIRTZ

STATE OF MISSISSIPPI
COUNTY OF ADAMS

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, the within named CHARLENA WIRTZ, who acknowledged that she signed and delivered the above and foregoing instrument on the day and year therein written and for the intents and purposes therein recited.

WITNESS MY SIGNATURE AND OFFICIAL SEAL of office on this the _____ day of _____, 1993.

_____
NOTARY PUBLIC

My Commission Expires:

_____

STATE OF MISSISSIPPI
COUNTY OF ADAMS

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, the within named CHARLENA WIRTZ, who stated that she is the Executrix of the Estate of

Lena Watson Whitley, and who acknowledged that for and on behalf of the Estate of Lena Watson Whitley, she signed and delivered the above and foregoing instrument on the day and year therein written and for the intents and purposes therein recited.

WITNESS MY SIGNATURE AND OFFICIAL SEAL of office on this the _____ day of _____, 1993.

_____
NOTARY PUBLIC

My Commission Expires:

_____

STATE OF MISSISSIPPI
COUNTY OF ADAMS

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, the within named LYNN WIRTZ, who acknowledged that he signed and delivered the above and foregoing instrument on the day and year therein written and for the intents and purposes therein recited.

WITNESS MY SIGNATURE AND OFFICIAL SEAL of office on this the _____ day of _____, 1993.

_____
NOTARY PUBLIC
My Commission Expires:

_____

STATE OF MISSISSIPPI
COUNTY OF ADAMS

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, the within named ELIZABETH WIRTZ, who acknowledged that she signed and delivered the above and foregoing instrument on the day and year therein written and for the intents and purposes therein recited.

WITNESS MY SIGNATURE AND OFFICIAL SEAL of office on this the _____ day of _____, 1993.

NOTARY PUBLIC

My Commission Expires:

_____

STATE OF MISSISSIPPI
COUNTY OF ADAMS

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, the within named ANDREW WIRTZ, who acknowledged that he signed and delivered the above and foregoing instrument on the day and year therein written and for the intents and purposes therein recited.

WITNESS MY SIGNATURE AND OFFICIAL SEAL of office on this the _____ day of _____, 1993.

NOTARY PUBLIC

My Commission Expires:

_____

STATE OF MISSISSIPPI
COUNTY OF ADAMS

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, the within named CLAY WIRTZ, who acknowledged that he signed and delivered the above and foregoing instrument on the day and year therein written and for the intents and purposes therein recited.

WITNESS MY SIGNATURE AND OFFICIAL SEAL of office on this the _____ day of _____, 1993.

NOTARY PUBLIC

My Commission Expires:

_____